Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

CHRISTOPHER T. BREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Appointed Pursuant to the Criminal Justice Act

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QUESTIONS PRESENTED

1. Should elements of 21 U.S.C. §841 be found at trial by a jury or at sentencing by a judge?

2. Can a federal court exclude time retrospectively and state that a pro se defendant waives de novo review of the record, indictment to trial, in a speedy trial motion?

3. Was denial of Defendant's motion to suppress in direct violation of the Fourth Amendment?

4. Are prosecution witnesses allowed to receive payment in violation of 18 U.S.C. §201C(3)?

5. Did denying Defendant's expert witness violate his due process rights?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. QUANTITY DETERMINATION OF A NARCOTIC FOR VIOLATION OF TITLE 21 U.S.C. §841 IS AN ELEMENT THAT MUST BE FOUND AT TRIAL BY A JURY UNDER A STANDARD OF PROOF BEYOND A REASONABLE DOUBT. NO QUANTITY DETERMINATION BY A JURY VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND TRIAL BY JURY RIGHTS OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION 4

II. A COURT CANNOT EXCLUDE TIME RETROSPECTIVELY AND STATE THAT DEFENDANT WAIVES DE NOVO REVIEW OF THE RECORD, FROM INDICTMENT TO TRIAL, IN A SPEEDY TRIAL MOTION 15

III. DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED 22

IV. THE WITNESSES FOR THE GOVERNMENT ACCEPTED PAYMENT IN EXCHANGE FOR THEIR TESTIMONY, IN VIOLATION OF 18 U.S.C. §201C(3) 24

TABLE OF CONTENTS – Continued

Page

V. THE DISTRICT COURT'S DENIAL OF DEFENDANT'S EXPERT WITNESS FROM TESTIFYING VIOLATED DUE PROCESS 25

CONCLUSION 30

INDEX TO APPENDICES

APPENDIX A .....App. 1

APPENDIX B.....App. 19

APPENDIX C.....App. 21

APPENDIX D .....App. 59

APPENDIX E.....App. 70

APPENDIX F.....App. 73

APPENDIX G.....App. 79

APPENDIX H .....App. 83

APPENDIX I .....App. 86

APPENDIX J .....App. 93

TABLE OF AUTHORITIES

Page

CASES

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985) 29

Almendarez-Torres v. U.S., 118 S.Ct. 1219 (1998) 5

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000) ..... *passim*

Carless Jones v. U.S., 120 S.Ct. 273 (2000) 11

Daubert v. Merrill-Dow Pharmaceuticals, 509 U.S. 579 (1993) 27

In Re Winship, 397 U.S. 358 (1970) 11

Jones v. United States, 119 S.Ct. 1215 (1999) 5, 9

Manson v. Brathwaithe, 432 U.S. 98 (1977) 27

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 11

Sullivan v. Louisiana, 508 U.S. 275, 1135 S.Ct. 2078, 124 L.Ed. 2d 182 (1993) 5

U.S. v. Barnes, 158 F.3d 662 (2nd Cir. 1998) 10

U.S. v. Candelario, ___ F.3d ___ 99-11443 (11th Cir. 2/05/2001) 12

U.S. v. Janek, 723 F.2d 537 (7th Cir. 1983) 16

U.S. v. Jones, 119 S.Ct. 1229 (2000) 9

U.S. v. Keith, 230 F.3d 784 (5th Cir. 2000), *cert. denied*, 2001 LEXIS 1664 (2001) 13

U.S. v. Lowe, 2000 WL 176868 (W.VA. 11/28/2000) 12

U.S. v. Meshack, 225 F.3d 556 (5th Cir. 2000) 11

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Mietus, ___ F.3d ___ No. 99-3535 (7th Cir. 1/22/2001) 12

U.S. v. Noble, No. 99-2899 (7th Cir. 4/05/2001) 12

U.S. v. Norby, 225 F.3d 1053 (9th Cir. 2000) 12

U.S. v. Rebmann, 226 F.3d 51 (6th Cir. 2000) 12

U.S. v. Rogers, 228 F.3d 1318 (11th Cir. 2000) 12

United States v. Aguayo-Delgado, 2000 WL 988128 ....12, 13

United States v. Angle, 230 F.3d 121 (4th Cir. 2000) 11

United States v. Barnes, 159 F.3d 4 (1st Cir. 1998) 20

United States v. Baskin-Bey, 45 F.3d 200 (7th Cir. 1995) 19

United States v. Blackwell, 12 F.3d 44 (5th Cir. 1994) 17

United States v. Boissoneault, 926 F.2d 230 (2nd Cir. 1991) 27

United States v. Breen, 243 F.3d 591 (2nd Cir. 2001) ..*passim*

United States v. Brock, 782 F.2d 1442 (7th Cir. 1986) 19

United States v. Bryant, 726 F.2d 510 (9th Cir. 1984) 18

United States v. Carrasquillo, 667 F.2d 390 (3rd Cir. 1981) 18

United States v. Grimaldo, ___ F.3d ___, 2000 WL 709498 (8th Cir. 2000) 13

United States v. Doggett, 230 F.3d 160 (5th Cir. 2000) 12

United States v. Doran, 882 F.2d 1511 (10th Cir. 1989) 18

United States v. Fields, 242 F.3d 393 (D.C. Cir. 2001) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Garcia. No. 00-1408, 2001 WL 167018 at 1 (2nd Cir. 2/20/2001)..... 10

United States v. Gaudin, 515 U.S. 506 (1995)..... 6

United States v. Giambrone, 920 F.2d 176 (2nd Cir. 1990)..... 21

United States v. Hester, 199 F.3d 1287, 2000 WL 11751 *4 (11th Cir. 2000)..... 13

United States v. Jarell, 147 F.3d 315 (4th Cir. 1998) 19

United States v. Jones, 194 F.3d 1178 (10th Cir. 1999) 13

United States v. Keith, 42 F.3d 234 (4th Cir. 1994) 17

United States v. Kelly, 45 F.3d 45 (2nd Cir. 1995)..... 16

United States v. Kisjewski, 877 F.2d 210 (1989)..... 21

United States v. Lewis, 759 F.2d 1316 (8th Cir. 1985) 19

United States v. Lumpkin, 192 F.3d 280 (2nd Cir. 1999)..... 28

United States v. Perez-Reveles, 715 F.2d 1352 (1983) 18

United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) 20

United States v. Rodriguez, 63 F.3d 1159 (1st Cir. 1995)..... 20

United States v. Salery, 119 F. Supp. 2d 1270 (M.D. Alabama 2000) 12

United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993)..... 18

United States v. Staula, 80 F.3d 596 (1st Cir. 1996) 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Thomas, 204 F.3d 381 (2nd Cir. 2000), 121 S.Ct. 749, 148 L.Ed. 2d 653 (Jan. 8, 2001) 12

United States v. Tunnessen, 763 F.2d 77 (2nd Cir. 1985) 15

United States v. Wade, 388 U.S. 218 (1967) 27

United States v. Williams, 12 F.3d 452 (5th Cir. 1994) 19

United States v. Williams, 338 U.S. App. D.C. 310, 194 F.3d 100 (D.C. Cir. 1999) 13

United States v. Willis, 958 F.2d 64 (5th Cir. 1992) 17

Watkins v. Sowders, 449 U.S. 341 (1981) 27

STATUTES AND RULES

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 2, 23

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION 2, 4, 6, 22

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION 2, 4, 5, 6, 14

18 U.S.C. §201C(3).....2, 24

18 U.S.C. §924(c) 3

18 U.S.C. §3161..... *passim*

18 U.S.C. §3162..... 2

18 U.S.C. §3231..... 1

18 U.S.C. §841.....4, 8, 11, 12

21 U.S.C. §841(a)(1).....2, 4, 6, 9

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. §841(b)(1)(A) 2, 4, 6, 9
21 U.S.C. §841(b)(1)(B) 2, 4, 6, 9
21 U.S.C. §841(b)(1)(C) 9, 10, 12
21 U.S.C. §841(b)(1)(D) 9
21 U.S.C. §841(b)(4) 9, 12
21 U.S.C. §846 2
28 U.S.C. §41 1
28 U.S.C. §1254(1) 1
28 U.S.C. §1257 1
28 U.S.C. §1291 1
28 U.S.C. §1294 1
U.S.S.G. §2D1.1 8
U.S.S.G. §2D1.1(b)(1) 2
U.S.S.G. §2D1.1(c)(1), (2), (3), (4), (14), (17) 2
U.S.S.G. §3B1.1(c) 2, 8
F.R.E. 702 ..... 2, 27
F.R.E. 704(a) 2, 27

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER T. BREEN respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 16, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is published by order of the Second Circuit at *United States v. Breen*, 243 F.3d 591 (2nd Cir. 2001). A defendant's petition for panel rehearing and suggestion for rehearing EN BANC was denied on May 15, 2001.

JURISDICTION

The district court has subject matter jurisdiction over the case by indictment filed August 10, 1993 and superseding indictment, filed November 17, 1994, pursuant to 18 U.S.C. §3231.

The Court of Appeals for the Second Circuit has jurisdiction via Notice of Appeal entered March 29, 2000 after sentencing of Defendant. The Appellate Court has jurisdiction over appeals from final judgments of the district court pursuant to 28 U.S.C. §§41, 1291 and 1294.

The Supreme Court of the United States has jurisdiction over this Petition for Writ of Certiorari under 28 U.S.C. §§1254(1) and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 4th Amendment
United States Constitution, 5th Amendment
United States Constitution, 6th Amendment
Title 18 U.S.C. §201C(3)
Title 18 U.S.C. §3161(c)(1), (h), (h)(8)(A)
Title 18 U.S.C. §3162
Title 21 U.S.C. §841(a)(1), (b)(1)(A), (b)(1)(B)
Title 21 U.S.C. §846(a)(1), (a)(2)
United States Sentencing Guidelines §2D.1(b)(1), (c)(3), (c)(4)
United States Sentencing Guidelines §3B1.1
Federal Rules of Evidence 702
Federal Rules of Evidence 704(a)
(APPENDIX C)

STATEMENT OF THE CASE

Defendant Christopher T. Breen was arrested during his last ten weeks of law school in San Diego, CA, on February 5, 1992. No charges were filed against Mr. Breen after he obtained the services of Attorney Peter Hughes.

Mr. Breen was informed by Mr. Hughes that he was indicted on August 10, 1993 and was released on a $10,000 signature bond. Mr. Breen was charged with ten counts of conspiracy to possess with intent to distribute and to distribute marijuana and cocaine (21 U.S.C. §846); possession with intent to distribute, and to distribute marijuana (21 U.S.C. §841(a)(1) and §841(b)(1)(B)); possession with intent to distribute and to distribute cocaine (21 U.S.C. §841(a)(1) and §841(b)(1)(A)). Defendant (individually) was additionally charged with intentional

use of a firearm during and in relation to drug trafficking crime (18 U.S.C. §924(c)).

On November 17, 1994, Defendant's law professor, Boyd Blair McKinney, was named in a superseding indictment in Counts 1 and 10 of the August 10, 1993 indictment.

On December 13, 1999 Defendant Breen was acquitted of the 18 U.S.C. §924(c) firearm charge. Breen was found guilty of the remaining nine counts. Codefendant Leon was acquitted of all charges. Codefendant McKinney received a hung jury verdict and later pleaded guilty to a misdemeanor and received probation.

Defendant Breen was sentenced to 240 months incarceration on March 15, 2001. The base offense was at level 32 but was enhanced for relevant conduct to level 34, role in the offense to level 36 and possession of a firearm to level 38. (APPENDIX C)

Defendant appealed to the Second Circuit Court of Appeals. His main issues were denial of his Speedy Trial Act rights, 18 U.S.C. §3161 et al, and unconstitutional sentencing under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000). The lower court was affirmed.

Defendant's petition for a rehearing with a suggestion for rehearing En Banc was denied on May 15, 2001. (APPENDICES A & B)

REASONS FOR GRANTING THE PETITION

I. QUANTITY DETERMINATION OF A NARCOTIC FOR VIOLATION OF 21 U.S.C. §841 IS AN ELEMENT THAT MUST BE FOUND AT TRIAL BY A JURY UNDER A STANDARD OF PROOF BEYOND A REASONABLE DOUBT. NO QUANTITY DETERMINATION BY A JURY VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS OF THE FIFTH AMENDMENT AND NOTICE AND TRIAL BY JURY RIGHTS OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Supreme Court of the United States of America needs to decide the case of *United States v. Breen*. This case is directly on point with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000).

The basic issue here is: Does a jury need to determine the quantity of narcotics in a violation of 21 U.S.C. §841(a)(1) and (b)(1)(A) and (b)(1)(B)?

The court held in *Apprendi* that any fact which determines the statutory maximum penalty for an offense must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

Quantity determination of narcotics is an essential element of the substantive offense. Non-determination of an element violates the Fifth Amendment due process clause. It also violates the Sixth Amendment right to trial by jury. These are substantive rights under the Bill of Rights in the United States Constitution. Violation of these rights is constitutional error and falls into the automatic reversal category.

At trial, Defendant objected to the quantity of narcotics that the government was introducing into evidence. The Defendant had never been allowed to test or weigh the cocaine for the prior eight years. The district

court judge stated that weight was determined by the court and not by the jury. Defendant stated that a major case was about to change this methodology. Breen stated that *Almendarez-Torres v. U.S.*, 118 S.Ct. 1219 (1998), addressed this issue. Defendant later mentioned *Jones v. United States*, 119 S.Ct. 1215 (1999). This discussion occurred during trial at pages 23-26, 484-485, 568, 575, 650-656 of the trial transcript. (APPENDIX D)

The Defendant objected to the court's solo finding that he possessed 19 kilograms of cocaine at sentencing. The jury never determined any amount of cocaine. The jury was instructed during jury instructions, "If you find that the material was in fact the controlled substance named in the count, you *need not be concerned* with the *quantity*. So long as you find that a defendant named in the count knowingly distributed, or possessed with the intent to distribute the controlled substance named in the count, the *amount* involved is not important." Trial Transcript, 2901-2902. (APPENDIX E)

In *Sullivan v. Louisiana*, 508 U.S. 275, 1135 S.Ct. 2078, 124 L.Ed. 2d 182 (1993), a unanimous court held that constitutionally deficient jury instructions on reasonable doubt constituted a per se reversible error. In *Breen*, the court eliminated the jury from finding a quantity of narcotics the Defendant possessed or distributed; this was a structural error. Because the due process clause requirement that the government persuade the factfinder of guilt beyond a reasonable doubt and the Sixth Amendment right to have a jury decide guilt as "interrelated," the "jury verdict required by the Sixth Amendment is a jury verdict beyond a reasonable doubt." A constitutionally deficient instruction violates the Sixth Amendment, as it "does not produce such a verdict." There being no determination of quantity of narcotics

beyond a reasonable doubt, there has been no jury verdict within the meaning of the Sixth Amendment. No determination of the quantity element violates Defendant's Fifth and Sixth Amendment rights. *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

Count 1 states a violation of 21 U.S.C. §841(a)(1) and (b)(1)(A), Conspiracy to possess 5 or more kilograms of cocaine and 100 or more kilograms of marijuana. Trial Transcript, 2889-2900 (APPENDIX F)

The counts that required a minimum threshold of narcotics in violation of 21 U.S.C. §§841(b)(1)(A) and (b)(1)(B) were unconstitutionally found guilty by the jury. These statutes require a definitive quantity determination of five kilograms or more of cocaine and 100 kilos or more of marijuana, respectively, on Counts 3, 5, 10. The remaining counts fall under 21 U.S.C. §841(a) with no charged quantity.

A. Defendant's Substantive Due Process Rights Under The Fifth Amendment Were Violated.

The right to substantive due process exacting judicial scrutiny includes express constitutional rights. Defendant's express constitutional rights were violated when the judge determined the quantity of narcotics at sentencing that determined the mandatory length of Defendant's sentence under 21 U.S.C. §§841(a) and (b)(1)(A) and (b)(1)(B). This was a denial of a substantial fundamental right of the Constitution implicit in the concept of ordered liberty. Liberty is protected only against deprivation without due process.

Apprendi had redefined the area of elements of sentencing factors from prior Supreme Court cases under *stare decisis*. This is not a case of keep what you want and throw away the rest. Fundamental fairness doctrine dictates that this flesh-and-blood controversy be finalized to put an end to

the completely conflicting rulings by the United States circuit courts. A clear line ruling needs to be made on this novel issue which the lower courts are in a state of chaos over.

The inquiry to determine whether a right is fundamental for substantive due process should refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.

The *Apprendi* error was preserved at the district court level even though *Apprendi* was not ruled on by the Supreme Court at that date: There is no provision in the Constitution that exacts a quantity determination by a jury for narcotics. There is an amendment that requires a jury trial for all defendants charged with infamous crimes. There was an executive abuse by the judge in not allowing this jury interpretation of the facts, that the abuse of power was so egregious as to be arbitrary. This conduct should shock the conscience of this Court. The due process clause protects interests which are deeply rooted in the nation's history and traditions. The substantive due process rights are founded in a fundamental liberty interest. This liberty interest was taken away from the Defendant by denial of his objections to violations of his constitutional rights under the Fifth and Sixth Amendments. The procedural due process violation only controlled the methodology which the court used in the denial of the Defendant's substantive offense determination of essential elements (quantity). This substantive right is implied and read into the Constitution under *Apprendi*. The inquiry into what process is due is a federal question needing answer by the Supreme Court in interpreting the meaning of due process.

B. Defendant Was Enhanced Under The United States Sentencing Guidelines At Sentencing Unconstitutionally.

The Defendant objected to his enhancements along with the quantity determination by the judge. The enhancements under the United States Sentencing Guidelines have the force and effect of laws. The judge determined that Defendant possessed a firearm (U.S.S.G. §2D1.1) despite a jury acquittal on that count. This increased Defendant's recommended sentence under the Guidelines by four and one-half years. The judge determined Defendant to be a leader in the role in the offense (U.S.S.G. §3B1.1(c)). This increased Defendant's recommended sentence under the Guidelines by three and one-half years. (APPENDIX G)

If a fact is by law the basis for increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element. Aggravating facts are elements that must go to the jury. Any element which has the effect of raising a maximum sentence can no longer be considered a sentencing enhancement. It is an element that must be proved beyond a reasonable doubt to a jury. Elements of an offense must be alleged in an indictment and notice provided to the defendant. In a post-*Apprendi* memorandum order the Supreme Court stated that the amount of drugs is an enhancement element under 21 U.S.C. §841 and must accordingly be pled in the indictment and proved at trial. Enhancements under the U.S.S.G. must be considered as elements of an offense and subject to the doctrine of constitutional doubt.

Where a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that

both the loss of liberty and the stigma attached to the offense are heightened; it necessarily follows that the defendant should not – at the moment the state is put to proof of those circumstances – be deprived of protections that have until that point unquestionably attached. Namely, as a standard of proof beyond a reasonable doubt at trial by a jury than a standard of proof by preponderance of evidence by only a judge at sentencing. *Jones v. United States,* 119 S.Ct. 1215 (1999).

C. Counts In Indictment That Defendant Was Sentenced On Should Be Reversed.

In *Breen,* no quantity determination being found should void all counts of the indictment. The counts charging cocaine required a determination of five kilos or more at trial. 21 U.S.C. §841(b)(1)(A). No quantity being found by the jury makes a jury verdict unconstitutional in the count. The same is true for counts charging defendant with 100 kilos or more of marijuana under 21 U.S.C. §841(b)(1)(B).

The Court of Appeals for the Second Circuit found that the lowest statutory maximum for Breen's conviction under 18 U.S.C. §841(a)(1) is 20 years (Decision 3/16/00). That would be for 21 U.S.C. §841(b)(1)(C). (APPENDIX A, p. 17) That statute allows for a sentence of 0 to 20 years. No amount of cocaine being determined would allow the Defendant to be sentenced at level 12 under U.S.S.G., with a range of 10 to 16 months. The jury found no quantity determination of marijuana. The Defendant should have been sentenced under 21 U.S.C. §841(b)(4) for the marijuana counts. §841(b)(4) carries a maximum of one year. If Defendant was under 21 U.S.C. §841(b)(1)(D), the maximum for marijuana would be five years. No

mandatory minimums exist in these statutes. The Defendant was *eligible for level 6 on the marijuana counts, for* 0-6 months. (APPENDIX C)

The Court of Appeals bases its ruling on *United States v. Garcia*, No. 00-1408, 200 1 WL 167018 at *1 (2nd Cir. Feb. 20, 2001) (APPENDIX D). In *United States v. Breen*, 243 F.3d 591 (2nd Cir. 2001), Defendant is within the statutory maximum under 21 U.S.C. §841(b)(1)(C), 20 years, the lowest statutory maximum. Breen objected to the Prosecution's not having to prove the quantity of narcotics at trial and at sentencing. The jury instruction that told the jury not to find the drug quantity was in violation of Defendant's constitutional rights under the Fifth and Sixth Amendments. These objections were preserved in November, 1999 despite the fact that *Apprendi* came out June 26, 2000. The Second Circuit decision is in direct violation of *Apprendi* mandate and its progeny. Changing the counts of the indictment amounts to an unconstitutional constructive amendment to the indictment in violation of the Fifth Amendment, since 21 U.S.C. §841(b)(1)(C) was not charged in the original indictment. A lesser included offense instruction was not requested during trial, nor was a special verdict form for determination of quantity of narcotics. The rule of lenity should prevail on each count. *U.S. v. Barnes*, 158 F.3d 662 (2nd Cir. 1998). (APPENDIX E)

The key to sentencing under *Apprendi* will depend on whether this Court applies the statutory quantity approach, the guidelines quantity approach, or the specific quantity approach.

D. Serious Conflict Exists Among The Circuit Courts Involving *Apprendi*.

The cases and controversies requirement under Article III of the United States Constitution allows this Honorable Court to be capable of judicial resolution and not violate the separation of powers doctrine. The Court in this case should exercise its judicial reviews powers. The circuits are confused due to *In Re: Winship*, 397 U.S. 358 (1970). *Winship* applies to elements that distinguish a more serious crime from a less serious one. A state may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts upon which the distinction turns. The prosecution has the burden of persuasion on every element of the crime charged.

McMillan v. Pennsylvania, 477 U.S. 79 (1986) determined that the state has the authority to define the elements that constitute criminal conduct and may design statutes that facilitate proof of every element. Due process does not require the government to prove beyond a reasonable doubt the existence of facts that do not bear on the defendant's guilt.

The confusion and conflicting rulings in 21 U.S.C. §841 cases among the circuits occur when the courts look at the *Apprendi* ruling and compare it with *Winship* and *McMillan*. *Carless Jones v. U.S.*, 120 S.Ct. 273 (2000) should have helped clear things up. *United States v. Fields*, 242 F.3d 393, 396 (D.C. Cir. 2001) reversed a sentence because the drug quantity and sentencing guideline enhancement for leadership were improper in light of *Apprendi*. *U.S. v. Meshack*, 225 F.3d 556 (5th Cir. 2000) intimated that it would decide that "drug quantity" is an element of a 21 U.S.C. §841 offense. *U.S. v. Angle*, 230 F.3d 113, 121-124

(4th Cir. 2000), granted relief under *Apprendi* because no drug quantity had been charged in the indictment or submitted to the jury. *U.S. v. Rebmann*, 226 F.3d 51 (6th Cir. 2000) granted a reduction in sentence based on *Apprendi*. *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000). Quantity must be in indictment and submitted to a jury.

U.S. v. Lowe, 2000 WL 176868 (W.VA. 11/28/2000) in light of *Apprendi*, when a defendant is charged with distribution of marijuana without more, the defendant is subject to the statutory maximum penalty of one year of imprisonment pursuant to 21 U.S.C. §841(b)(4). *United States v. Salery*, 119 F. Supp. 2d 1270 (M.D. Alabama 2000).

Many courts feel that a sentence is harmless under 21 U.S.C. §841 unless it is over 20 years. *U.S. v. Rogers*, 228 F.3d 1318 (11th Cir. 2000). *United States v. Aquayo-Delgado*, 2000 WL 988128. *U.S. v. Noble*, No. 99-2899 (7th Cir. 4/05/2001). The Noble panel vacated a drug sentence that exceeded 20 years under 21 U.S.C. §841(b)(1)(C). *United States v. Thomas*, 204 F.3d 381, 383 (2nd Cir. 2000) vacated by Supreme Court in light of *Apprendi*. Stated quantity was an element, not a sentencing factor.

Many courts are not considering *Apprendi* error constitutional error. They regard imposing a sentence beyond the maximum as plain error. *U.S. v. Norby*, 225 F.3d 1053 (9th Cir. 2000). *U.S. v. Mietus*, ___ F.3d ___ No. 99-3535 (7th Cir. 1/22/2001) unless a defendant objected at sentencing that a jury did not find and determine drug quantity elements (or whatever fact or elements used to increase the maximum penalty), then the plain error standard will be applied. *U.S. v. Candelario*, ___ F.3d ___ 99-11443 (11th Cir. 2/05/2001), required defendants to have raised the issue as a constitutional question at sentencing.

There are 138 published opinions on *Apprendi*. Most go against the Supreme Court ruling. *United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000), *cert. denied*, 2001 LEXIS 1664 (2001); *United States v. Aguayo-Delgado, id.*, facts that mandate mandatory minimums are not elements. Drug quantity is a sentencing factor to be established by the district judge. *United States v. Hester*, 199 F.3d 1287, 2000 WL 11751, *4 (11th Cir. 2000); *United States v. Jones*, 194 F.3d 1178, 1186 (10th Cir. 1999); *United States v. Williams*, 338 U.S. App. D.C. 310, 194 F.3d 100, 106-07 (D.C. Cir. 1999). *United States v. Grimaldo*, ___ F.3d ___, 2000 WL 709498 (8th Cir. 2000).

The harm done by the operation of this unconstitutional process while we await a case and controversy to move from embryo to reality may never be fully undone by a later decision even if it is forthcoming. The United States Court of Appeals has decided an important question of federal law in *Breen* that has not been settled under *Apprendi* but should be settled by this Court. The published decision as it stands is in direct conflict of the Supreme Court mandate under *Apprendi*. The court committed structural constitutional error in *Breen*.

E. Breen Qualifies For Certiorari Under Reserved Review Doctrine For The United States Supreme Court.

The issues in *Breen* are not premature or abstract. *Breen* is a case calling for nonjudicial restraint. It requires delicacy of the judicial function in constitutional cases. There appears to be no comparative finality of decisions from the lower courts resting on constitutional grounds. There is a direct need for appropriate consideration by

other repositories of constitutional power. This Honorable Court needs to preserve the constitutional allocation of powers, especially that of the courts. Definition of the inherent limitations of the judicial process relates to substantive and procedural due process. This case needs to be granted certiorari to show lower courts exactly the standard the Supreme Court intends to use. A Supreme Court remanded order vacatur is not final determination on the merits. This leads to difficulty in determining whether the barrier to decision was from the Constitution or from the Court's self-imposed sense of restraint. Vacatur and remand by this Court does not create the implication that the lower court should change its prior determination.

Breen has requisite standing to grant certiorari. Defendant has suffered an injury in fact. The district court invaded his legally-protected due process rights. Defendant's substantial right to trial by jury is concrete and particularized and actual or imminent, not conjectural or hypothetical, under the Sixth Amendment. The violation of these rights are fairly traceable to the actions of the district court and denial of the Defendant's appeal in the Second Circuit. It is finally very likely that this violation of Defendant's constitutional rights will be redressed upon certiorari and his liberty interests restored.

Defendant Breen therefore requests this Honorable Court to grant his petition for a Writ of Certiorari.

II. A COURT CANNOT EXCLUDE TIME RETROSPECTIVELY AND STATE THAT DEFENDANT WAIVES DE NOVO REVIEW OF THE RECORD, FROM INDICTMENT TO TRIAL, IN A SPEEDY TRIAL MOTION.

The District Court held a status conference for defendants on May 25, 1999. The Judge set trial for August 2, 1999. This date violated the Speedy Trial Act. Codefendant's attorney inquired how firm the court was on the trial date because he had just come into the case. The judge stated that if he changed the trial date he did not know how it would affect the other defendants under the Speedy Trial Act. The codefendant's attorneys and Defendant's advisory counsel offered to waive their speedy trial rights. The Judge then began to discuss the court's busy schedule along with counsels' busy schedules. The judge never excluded the time under the Speedy Trial Act, either orally or in writing. None of the above reasons allows for time to be excluded without an ends of justice analysis and order to exclude the time under Title 18 U.S.C. §3161(h)(8)(a). (APPENDIX H)

Congress provided that no such exclusion may be employed "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by granting of continuance outweigh the best interests of the public and defendant in a speedy trial."

The Speedy Trial Act plainly contemplates that the district judge must determine before granting the continuance that society's interest in meeting the "ends of justice" outweighs the interest of the defendant and of society in achieving speedy trial. *United States v. Tunnessen*, 763 F.2d 77 (2nd Cir. 1985). "The decision to grant

an ends of justice continuance must be prospective, not retroactive; an order granting continuance on that ground must be done at the outset of the excludable period. *Id.* This clearly was not done in *United States v. Breen,* 243 F.3d 591 (2nd Cir. 2001).

"Time cannot be excluded based on the ends of justice unless the court indicates at the time it grants the continuance that it is doing so upon a balancing of the factors specified in 18 U.S.C. §3161(h)(8)." *United States v. Kelly,* 45 F.3d 45 (2nd Cir. 1995).

There is but one clock for all defendants. The judge never made a statement or a written order including the ends of justice requirement for the exclusion of the time.

Defendants cannot waive their rights under the Act. The district court failed to balance the needs of the Defendant with the needs of society for a speedy trial. The Defendant filed a Speedy Trial Act violation motion. The judge denied the motion and put his reasons for granting an exclusion of time on the record at the end of the trial.

U.S. v. Janek, 723 F.2d 537, 544-45 (7th Cir. 1983) stated, "that may well be too late. If the judge gives no indication that a continuance was granted upon a balancing of factors specified by the Speedy Trial Act until asked to dismiss the indictment for violation of the Act, the danger is great that every continuance will be converted retroactively into a continuance creating excludable time, which is not the intent of the Act."

The Defendant waited nearly eight years from the date of his arrest during his last ten weeks of law school until trial in November, 1999. Defendant made the Court aware of his speedy trial concerns immediately after his indictment 18 months after his arrest.

The Judge and AUSA did not understand the Speedy Trial Act. A co-defendant's offer to waive the Act unilaterally does not exclude time under the Act. The Judge refers to the 3030 Act. The Judge states he does not know how the Speedy Trial Act affects codefendants. The Judge told the AUSA to find out if discovery stops the clock, after Defendant's motion was filed. The Court set the original trial date of August 2, 1999 more than 70 days outside the limit of the Act. The Court never balanced the reasons for the delay. The Court discussed its own trial schedule problems as a factor in the new trial date of November 1, 1999 in violation of the Act. The Court never issued and the AUSA never requested an order, orally or written, excluding the time and providing Defendant with notice. The Judge never excluded the time when he changed the trial date from November 1, 1999 to November 8, 1999.

United States v. Keith, 42 F.3d 234 (4th Cir. 1994), District Court may not grant ends of justice continuance under Speedy Trial Act *nunc pro tunc*. 18 U.S.C. §3161(h)(8)(A).

United States v. Willis, 958 F.2d 64 (5th Cir. 1992). Our holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking or agreeing to a continuance.

United States v. Blackwell, 12 F.3d 44 (5th Cir. 1994), Defendant made a motion for sixty days of continuance. No ends of justice statement orally or in writing was made, nor a balancing analysis on the record for the reasoning for the continuance. The Court stated if the judge gives no indication that continuance was granted

on a balancing of factors, every continuance will be converted retroactively into a continuance creating excludable time. The court order just granting continuance does not satisfy the Act's ends of justice requirement. 18 U.S.C. §3161(h)(8)(A).

Although findings supporting an ends of justice continuance may be *entered* on the record after the fact, they may not be *made* after the fact if continuance is to be excluded under the speedy trial statute; balancing must occur contemporaneously with the granting of the continuance. *United States v. Doran*, 882 F.2d 1511 (10th Cir. 1989).

United States v. Saltzman, 984 F.2d 1087 (10th Cir. 1993), The court stated that the defendant cannot waive the Speedy Trial Act unilaterally. The court must simultaneously make an "ends of justice" finding.

United States v. Carrasquillo, 667 F.2d 390 (3d Cir. 1981). It is incumbent on the court to make the necessary 18 U.S.C. §3161(h)(8)(A) findings before a court may grant a continuance.

United States v. Perez-Reveles, 715 F.2d 1352 (1983). The judge's collective failure to make any 18 U.S.C. §3161(h)(8)(A) "ends of justice" findings is a blatant disregard to detail and an abandonment of their obligation to protect the rights of the defendant and public. The prosecution and judge were oblivious to their obligations to protect the public's concomitant rights as mandated by law. The judge has a mandatory duty imposed by law.

United States v. Bryant, 726 F.2d 510 (9th Cir. 1984). A court may not designate a continuance "in the ends of justice" *nunc pro tunc* upon hearing a motion to dismiss.

United States v. Brock, 782 F.2d 1442, 1448 (7th Cir. 1986) rights under the Act not waived even when defense counsel only mentioned Speedy Trial Act in passing, but not in motion to dismiss indictment.

The appeals courts are in conflict over the ends of justice exclusion of time. *United States v. Jarell*, 147 F.3d 315, 318 (4th Cir. 1998) trial court's failure to make appropriate findings for "ends of justice" continuance does not bar Court of Appeals' determining that delay excludable, where record sets forth sufficient facts to support appropriate finding.

United States v. Williams, 12 F.3d 452, 460 (5th Cir. 1994) "ends of justice" findings not required when reasons for continuance are plain from record.

United States v. Baskin-Bey, 45 F.3d 200, 203-04 (7th Cir. 1995), *United States v. Lewis*, 759 F.2d 1316, 1351-52 (8th Cir. 1985).

A. The Court Has Changed The Standard Of Review From De Novo To Clearly Erroneous For Speedy Trial Act.

The Defendant was given thousands of pages of documents one week before trial, although the indictment was six and a half years old. Defendant drafted his Speedy Trial Motion and used the calculation of 66 days remaining from a court order excluding time. The court had adopted the 66 days remaining from the AUSA's earlier statement. The Defendant vigorously opposed this 66 days remaining when questioned at oral argument on the motion in district court. He stated that there could be Speedy Trial error in the 400-plus court docket entries from indictment until the present motion. The AUSA

opposed this judicial review of the time. The court stated that Breen had waived review. (APPENDIX I)

Here the court shows it does not understand the Act. A waiver of Speedy Trial rights under the Act occurs when no motion to dismiss is filed before *voir dire* commences. The Defendant filed his *pro se* Motion before *voir dire*. A reasonable court cannot state the defendant did not invoke his Speedy Trial rights under the Act. The Court docket is voluminous. No court wants to analyze it. The new standard of review has been changed from *de novo* review to clearly erroneous.

"When a motion for dismissal is brought under the Speedy Trial Act, the district court must review the course of events from the indictment up to the filing of the motion to dismiss, tracking each motion and proceeding which occurred during that period and evaluating the resultant delay under the Act." *United States v. Pringle*, 751 F.2d 419, 429 (1st Cir. 1984). An appellate court presented with a Speedy Trial issue "must start from scratch in the computation of excludable and non-excludable time under the Act." *Id.*

"We review the district court's denial of defendant's motion to dismiss on the Speedy Trial Act *de novo*." *United States v. Rodriguez*, 63 F.3d 1159, 1162 (1st Cir. 1995). First we must "do the basic mathematics and determine the appropriate time elapsed awaiting trial." *United States v. Staula*, 80 F.3d 596, 600 (1st Cir. 1996). *United States v. Barnes*, 159 F.3d 4 (1st Cir. 1998).

The Court of Appeals panel found Breen's argument that many more days had run prior to May 25, 1999 without merit on the basis of "admissions in the district court." (Opinion, note 5, p. 13) Defendant submits that

the panel should have conducted a *de novo* review of the record to calculate the speedy trial clock.

B. The Standard For Determining Whether Time Has Been Excluded Providing Defendant With Notice Under 18 U.S.C. §3161(h)(8)(A) Is An Important Question Of Federal Law That Should Be Settled By This Court.

Circuit law is in direct contradiction with the published opinion in *Breen*. Defendant's case raises novel questions. The *pro se* Defendant is being held to a higher exacting standard than in any other circuit. The Western District of New York has a history of Speedy Trial Act abuse. *United States v. Kisjewski*, 877 F.2d 210, 215 (1989) (noting that it was "disquieting that so many of our recent Speedy Trial Act opinions are in cases coming from the Western District.") *United States v. Gianbrone*, 920 F.2d 176 (2nd Cir. 1990) (citing six published decisions representing Speedy Trial Act violations by the U.S. Attorney's Office for the Western District.)

Doctrine requires federal courts to determine whether a question has been committed by the Constitution to another branch of national government. Congress was given the power to enact laws. It decided in enacting 18 U.S.C. §3161 et al. to limit the court and government's ability to keep a defendant in anxiety and societal pressure of a public accusation of criminal conduct. Society has an interest in a speedy trial for correlation between behavior and punishment and rehabilitation of individuals.

The lower courts took away Congress's intended legislation that prevents society's and defendants' injustice. The Act has specific requirements that are ignored repeatedly.

A stigmatizing injury has occurred to Defendant, because Breen has personally been deprived of equal protection under the Fifth Amendment of the United States Constitution. This injury cannot be resolved with a new trial owing to ten years of prosecution. The error commands dismissal with prejudice.

This Honorable Court should grant certiorari to eliminate once and for all the disparity among circuits on the rights of a defendant and society under the Speedy Trial Act.

III. DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED.

The Defendant was charged and convicted of possession of 100 kilos or more of marijuana. Three hundred thirteen pounds of marijuana were sent from San Diego, California to Orchard Park, New York on February 3, 1992. The UPS packages containing marijuana were searched at the Postal Annex (a private shipping store) in Del Mar, California by Postal Annex employees under direct supervision of the DEA and by the DEA agent himself without a warrant. The marijuana was controlled-delivered to Orchard Park, where an unindicted codefendant was arrested. Defendant Breen was indicted on August 10, 1993.

Defendant brought a pretrial motion to suppress the marijuana due to an illegal search and seizure by employees of the Postal Annex and DEA agent. The District Court stated Defendant did not have standing to

challenge the warrantless search. The Court stated Defendant had no possessory interest in the shipped boxes.

Defendant was a target of the DEA investigation. The government indicted the Defendant by using employee testimony at the Postal Annex, stating the Defendant shipped the boxes. Defendant was convicted of possession with intent to distribute the marijuana. Defendant was convicted of conspiracy to possess and distribute this marijuana along with his law professor (whose trial ended with a hung jury).

A. The Supreme Court Should Use Its Supervisory Power To Break Out Of This Denial Of The Standing Requirement.

The Defendant has a legitimate expectation of privacy in the packages he was targeted to have sent.

The government should not be allowed to use this evidence without the Defendant's use of the Fourth Amendment. The government should not be allowed to take advantage of contradictory positions as a basis of conviction. The Defendant has standing. There was an invasion of a legally protected interest. The warrantless search of packages Defendant is proven to possess is concrete and particularized. After conviction, how can the government claim this possession is not actual? The illegal search was caused by the government agent searching the shipment at the Postal Annex without warrant. There is no doubt the Defendant will benefit by the suppression of this unconstitutional evidence by reversing his conviction, and by excluding all the derivative evidence that stemmed from the violation under the exclusionary rule.

IV. THE WITNESSES FOR THE GOVERNMENT ACCEPTED PAYMENT IN EXCHANGE FOR THEIR TESTIMONY IN VIOLATION OF 18 U.S.C. §201C(3).

Title 18 U.S.C. §201. Bribery of public officials and witnesses

> (c) Whoever –
>
> (3) directly or indirectly, demands, seeks, receives, accepts or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any trial, hearing or other proceeding, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.

The Defendant seeks that the trial be overturned on the grounds that the government paid witnesses for their testimony given at the grand jury and at the trial in District Court in the Western District of New York. The Defendant knows that individual witnesses received things of value in exchange for testimony used against Defendant.

Stephen Deckard received payment of $374,000 and testified in Mr. Breen's grand jury. He was also named on the trial witness list, but never called by the government. Mr. Deckard was also never prosecuted for a ten kilogram cocaine conspiracy in which he was arrested while making a sale to an undercover officer.

Jay Moen received payment of $15,000 in exchange for his testimony in Mr. Breen's grand jury. Mr. Moen was arrested and never prosecuted in the same cocaine conspiracy with Mr. Deckard. Mr. Moen was a crucial government witness at Mr. Breen's trial.

David Dillon had two charges dropped from his being arrested with the controlled delivery of 313 pounds of marijuana. Mr. Dillon had a handgun charge and possession with intent to distribute within 1000 yards of a school zone dropped, and forfeiture proceedings on his house dropped in exchange for his testimony in Mr. Breen's grand jury trial in the Western District of New York.

Garene Warner was given probation for a sale of cocaine in exchange for her testimony against Mr. Breen at this same trial.

The Defendant requests this Honorable Court to use this illegal testimony as a standard of review to find an abuse of discretion by the District Court. The court committed reversible error allowing paid government witnesses to illegally testify against the Defendant in his criminal trial.

V. THE DISTRICT COURT'S DENIAL OF DEFENDANT'S EXPERT WITNESS FROM TESTIFYING VIOLATED DUE PROCESS.

On December 6, 1999 Defendant filed a Notice of Anticipated Expert Testimony. The testimony was for the expert witness in eyewitness identification. The individual was Dr. Mara B. Goodman, a doctor of psychology from Fredonia State University. Dr. Goodman had done extensive research with similar photo arrays employed by Agent Patton while he was a rookie with the DEA conducting his first photo identification. Agent Patton had also constructed the photo arrays used at the Postal Annex. Defendant provided the court with a list of areas the Defendant planned to explore with Agent Patton's

methodology in his conducting of the photo array. Defendant was to ask Dr. Goodman questions on how Agent Patton's procedures could influence the witnesses. The agent caused experimenter expectancy effect. Dr. Goodman would have testified that by Agent Patton's creating the photo array and presenting this array to Shawn Hilly, he caused a bias in the identification process. The slightest changes in presentation of a photo array can affect the results. Agent Patton knew the suspect he wanted identified. Dr. Goodman would have explained how a biased displayer of a photo array can cause confidence malleability. The close proximity of Agent Patton to Shawn Hilly, along with the fact that he did not state that the suspect might or might not be in the array, can be so impermissibly suggestive as to contaminate any results. Dr. Goodman would have testified to the effect of time between the event, shipping of packages, and the presentation of the photo array and its effect on correct identification. Dr. Goodman would have talked about the proper way to construct a proper photo array and the problems with photo arrays that are not constructed properly. She would have described how the photographs Agent Patton used could influence the witness's perception and ultimate identification. Identification bleeding occurred at prior hearings when Mr. Hilly saw defendants in court and on the photo array. This gave him more confidence in his choice and stopped his true perception of the actual event. Mr. Hilly had seen Mr. Breen in four different court proceedings. Dr. Goodman would have talked about her three experiments in the photo array field. This experience and her specialty in cognitive psychology and the mind would have provided the jury with relevant scientific knowledge that the jury would

not otherwise have received from just Mr. Hilly's and Agent Patton's testimony. Misidentification is the major cause of wrongful conviction. Mr. Hilly's identification of Mr. Breen was the most important evidence in the government's case. The jury was misled without Dr. Goodman's testimony.

The seminal case in expert testimony being allowed into federal cases is *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The Court "has also recognized the inherently suspect qualities of eyewitness identification evidence." *Watkins v. Sowders*, 449 U.S. 341, 350 (1981). Such evidence is "notoriously unreliable," *United States v. Wade*, 388 U.S. 218, 228 (1967); *Manson v. Brathwaite*, 432 U.S. 98, 111-12 (1977), and has distinct impacts on juries.

If scientific, technical or other specialized knowledge will assist jurors to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. F.R.E. 702 "under this liberal rule, a qualified expert may generally suggest inferences that should be drawn from the facts, *see* F.R.E. 702, Advisory Committee's Note, including inferences embracing the ultimate issue in the case, *see* F.R.E. 704(a)." *United States v. Boissoneault*, 926 F.2d 230, 232 (2d Cir. 1991). The District Court Judge denied Dr. Goodman from testifying. This was an absolute abuse of discretion and reversible error committed by the court. The Defendant had been identified using this tainted procedure. Defendant had an absolute right to challenge the methodology used by Agent Patton. The judge had many ways to control the expert witness: 1) vigorous cross-examination; 2) presentation of contrary

evidence; 3) careful instruction on burden of proof. Denial of this crucial defense witness was reversible error. The judge abused his discretion by denying Defendant access to this witness at trial.

The decision to disallow Ms. Goodman's testimony was manifestly erroneous. The court decided that a psychologist testifying to matters relating to eyewitness identification could pass the first portion of the Daubert Test. The court found that the proposed testimony will not assist the trier of fact in this case to understand and determine a fact in issue. *United States v. Lumpkin*, 192 F.3d 280 (2nd Cir. 1999) The court stated page 2277, line 2 Trial Transcript (APPENDIX J) "The scientific studies would have confused the jury's assessment of the officer's credibility." The court stated page 2277, line 18, "The proposed testimony intrudes too much on the traditional province of the jury." And, on page 2278, lines 4-6, "Clearly, under the Second Circuit, any testimony regarding identification-regarding confidence would usurp the function of the jury." " . . . testify to such things as experimenter expectancy effect, as well as other studies, which the court determines would confuse the jury." "Many of the areas that Dr. Goodman would want to testify to are really matters of common sense and have been already effectively explored in cross-examination."

The expert having been qualified by the court, the testimony should have been allowed in for the trier of fact to decide what weight, if any, is to be given to the testimony. Defendant's cross-examination of the DEA agent who administered the photo array became worthless without tying in the expert witness testimony in the identification area. The expert testimony was "relevant" and "reliable" to the crucial defense strategy.

The unfair prejudicial impact of the loss of expert testimony affected Defendant's substantial due process right to defend himself. The pattern of abuse was clear. The court denied testing of contraband for six and one-half years. The court denied fingerprint testing of boxes and bales allegedly shipped by Defendant. The court denied CJA funding for an expert in audio forensics to testify regarding audiotape analysis, despite the prior testing having been presented years before. The court denied testing of consent to search document after the AUSA refused to turn it over to the lab for testing, in violation of a previous court order. This case was based on eyewitness identification. The fact that the indictment came 18 months after arrest disallowed preservation of alibi evidence. The witness even stated that the agent conducted his photo array 11 days after the event. The court's exclusion of this crucial evidence for Defendant's case in chief is fundamentally unfair.

The court's determination that the crucial expert witness, on whose testimony the entire defense was dependent, would not be helpful to the jury in understanding the evidence of eyewitness identification, or determining a fact in issue, was abuse of discretion. This was not a legal conclusion; it was a factual conclusion to be determined by the expert witness. Due process entitles indigent defendants to the services of court-appointed experts to "conduct appropriate examinations and to assist in evaluation, preparation, and presentation of their defense." *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel: Lauren Breen

Date: July 16, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2000

Argued: December 14, 2000

Decided: March 16, 2001

Docket No. 00-1241

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UNITED STATES OF AMERICA,

Appellee,

- against -

CHRISTOPHER T. BREEN,

Defendant-Appellant.

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Before: FEINBERG, PARKER, Circuit Judges and COVELLO,* District Judge.

Appeal from order of United States District Court for the Western District of New York (Charles J. Siragusa, Judge) convicting defendant on one count of conspiracy to possess with intent to distribute and to distribute cocaine and marijuana; two counts of possession with

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* Hon. Alfred V. Covello, Chief Judge of the United States District Court for the District of Connecticut, sitting by designation.

intent to distribute and distribution of cocaine; and six counts of possession with intent to distribute and distribution of marijuana. We affirm all of defendant's convictions.

LAUREN BREEN, Buffalo, New York (Hughes and Breen, of Counsel), for Defendant-Appellant.

WILLIAM J. KNAPP, Rochester, New York Assistant United States Attorney for the Western District of New York (Denise E. O'Donnell, United States Attorney for the Western District of New York, of Counsel), for Appellee.

FEINBERG, Circuit Judge:

Defendant Christopher T. Breen appeals from a judgment of conviction entered in March 2000 in the United States District Court for the Western District of New York (Charles J. Siragusa, Judge). Following a jury trial, Breen was convicted on one count of conspiracy to possess with intent to distribute and to distribute cocaine and marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841 (b)(1)(B) and 846; six counts of possession with intent to distribute and distribution of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and two counts of possession with intent to distribute and distribution of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). The jury acquitted Breen on the sixth count of the indictment that charged Breen used a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). The district court sentenced Breen principally to 240 months imprisonment followed by five years of supervised release. Breen's main argument for reversal is the district court's alleged failure to comply with the requirements of the Speedy Trial Act, 18

U.S.C. §§ 3161 et seq. For the reasons stated below, we affirm.

I. Background

A brief review of the chronology of the case is necessary. Breen was arrested by DEA agents in California in February 1992. After questioning regarding his involvement in suspected drug-trafficking activity, Breen was released without charges. More than a year later, on August 10, 1993 Breen and co-defendant Shawn Leon were charged in a 10-count indictment with various drug-trafficking and firearm offenses. Breen appeared with counsel on August 16, was arraigned on the indictment and was released on bail. On September 21, Breen requested and was granted assigned counsel. Shortly thereafter, Breen was granted permission to proceed pro se with the assistance of assigned stand-by counsel, Andrew Fleming. On November 17, 1994 a superseding indictment was returned, adding co-defendant Boyd Blair McKinney and charging him on the conspiracy and firearm counts.

Nearly five years passed before a key conference of all the defendants with the court on May 25, 1999. However, because of various motions and the difficulty in extraditing co-defendant Leon from his native Canada, the government claims that, as of the May 25, 1999 conference, only four days of non-excludable time had run on the 70-day speedy trial clock. As will be seen below,

Breen now disputes the accuracy of this calculation, despite his acquiescence to it in the district court.[1]

The purpose of the May 25 conference was to set a trial date and dispose of a few outstanding discovery matters. The district court clearly expressed concern about the age of the case.[2] The court noted the importance of expediting proceedings and stated that, notwithstanding two pending civil trials, he would fit the trial in his schedule on August 2, 1999 because "this case takes precedence." Thereafter, co-defendant Leon's counsel, Henry DePippo, objected, stating that because he had recently been brought into the case he would have great difficulty in preparing for trial by early August. To support his request, DePippo specifically cited the complexity of the case and the difficulty he anticipated in reviewing the record and the evidence. In addition, DePippo stated that he "would certainly waive any speedy trial consideration" if the district court would grant him the time he needed to prepare.

In response to DePippo's request, the district court inquired as to the consequences of co-defendant Leon's position for the other defendants' rights under the Speedy Trial Act. The district court raised the question

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[1] E.g., Breen stated in his pro se speedy trial motion dated November 4, 1999 in the district court that "there were 66 days left on the speedy trial clock on 5/25/99;" he also took the same position in open court 12 days later in response to a direct question from the judge during argument on the motion.

[2] At the May 25 conference, the district court stated "it bothers me that I am looking at a 1993 case . . . a 1993 criminal case does concern me."

whether the two other defendants were willing to accept a later trial date. Fleming, stand-by counsel for Breen (who was also present), stated that the August 2 date "would be very inconvenient" and that particularly "in light of [DePippo's] recent entry" into the case "I don't believe *anybody* is going to object to a November 1 trial date . . . " (emphasis added). With the consent of Breen's co-defendants' counsel and the government, the district court then set a trial date of November 1. Breen did not object. Indeed, when asked by the judge a few moments later if he understood that if he were not present on November 1, the "case would proceed in his absence," he replied that he did.

The trial date was later postponed one week to November 8, 1999. A few days prior to trial, Breen submitted a pro se motion to dismiss the indictment for violation of the Speedy Trial Act. In the motion, Breen argued that the district court's statements during the May 25 conference were not sufficient to exclude the subsequent time period and that therefore more than 66 days of non-excludable time had passed since the conference, compelling dismissal. During the trial, the district court heard argument on the motion in the absence of the jury and denied it in open court. In his ruling the judge elaborated on his May 25 decision to postpone the trial. He explained, among other things, that due to the concern voiced by defense counsel at that time, he had granted an exclusion of the time between May 25 and the start of trial pursuant to the "ends-of-justice" provision of the Speedy Trial Act, 18 U.S.C. § 3161(h)(8).

At trial, the government adduced evidence that on numerous occasions in 1991 and 1992 Breen conspired to

ship and shipped large quantities of cocaine and marijuana from Del Mar, California to Buffalo, New York.[3] The government also introduced evidence that Breen kept a handgun at his California residence that he used in furtherance of his drug-trafficking activities. As already indicated, the jury returned guilty verdicts against Breen on all nine drug counts of the indictment but acquitted him on the firearm count. At sentencing, the district court accepted the recommendation of the pre-sentence report and found, by a preponderance of the evidence, that Breen had mailed approximately 19 kilograms of cocaine and 306 kilograms of marijuana. The district court also found, by a preponderance of the evidence, that Breen had used a handgun in furtherance of his underlying drug offenses. After the district court sentenced Breen primarily to 240 months imprisonment, this appeal followed.

II. Discussion

On appeal, Breen principally argues that the district judge violated the Speedy Trial Act, primarily because he allegedly did not comply with the requirements of the ends-of-justice exclusion of 18 U.S.C. § 3161(h)(8). In addition, Breen argues that the court committed numerous other errors compelling reversal of his convictions. We consider these claims in turn.

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[3] The government produced shipping labels from packages that Breen had mailed. The labels indicated that Breen had shipped approximately 306 kilograms of marijuana and 19 kilograms of cocaine during the relevant period.

A. Speedy Trial Act

The Speedy Trial Act provides in relevant part that "the trial of a defendant charged in an information or indictment . . . shall commence within seventy days . . . from the date the defendant has appeared before a judicial officer of the court in which such charge is pending." 18 U.S.C. § 3161(b). Absent exclusions, if the trial does not begin within this 70-day period, the indictment must be dismissed. 18 U.S.C. § 3162(a)(2). As we have noted on prior occasions, the Act's time limit serves dual purposes: it protects "the defendant from undue delay in his or her trial and [ ] benefit[s] society by ensuring a quick resolution of criminal trials." *United States v. Kelly*, 45 F.3d 45, 47 (2d Cir. 1995).

Although the policy of the Act is clear, Congress was aware of the practical difficulties of bringing a criminal case to trial. Thus, the statute provides for certain clearly defined periods that are excluded from the speedy trial time calculation. *See* 18 U.S.C. § 3161(h). Among these is the "ends-of-justice" exclusion under which the trial court may exclude time "on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. §§ 3161(h)(8)(A). The statute identifies certain factors that the judge should consider in balancing these interests.[4] Importantly for the present

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[4] The various bases for ends-of-justice exclusions are set forth in 18 U.S.C. § 3161(h)(8)(B) which provides in relevant part:

case, the Act provides that an "ends-of-justice" exclusion may not be granted "unless the court sets forth, in the record of the case, either orally or in writing, its reasons

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(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).

Breen contends that the district court's findings on the record during the May 25, 1999 conference did not conform to the requirements of § 3161(h)(8)(A). Therefore, he argues that the time between that conference and the start of the trial in November may not be excluded. Breen does acknowledge that, during trial (more than 70 days after the May 25 conference), the district court did conduct a detailed ends-of-justice analysis in response to Breen's pro se motion to dismiss dated November 4, 1999. However, Breen argues that this type of retroactive finding is prohibited by our decisions in *United States v. Tunnessen*, 763 F.2d 74 (2d Cir. 1985) and *Kelly*, 45 F.3d 45.

In *Tunnessen*, the defendants were arraigned in December 1983. They filed pretrial motions in January 1984, which were deemed submitted in early February. On the basis of the motions, the district court decided to hold a suppression hearing, which took place on May 29. Also on that date, the parties consented to an order excluding for speedy trial purposes the period from February 6 to May 29. On July 6, 1984 the judge filed a memorandum Decision and Order disposing of all outstanding motions and scheduling the case for trial on September 25. By the time of that order, 35 days had run on the speedy trial clock. We observed that unless the July 6 order could "properly be construed as an ends-of-justice continuance, the latest possible trial date consistent with the Act's seventy-day limit was August 10, 1984." 763 F.2d at 75.

After the trial date was again postponed until early October, the defendants moved to dismiss the indictment on speedy trial grounds. In an opinion dated October 12, the district court denied the motion, stating in effect "that on July 6 it had in fact made an ends-of-justice determination [under § 3161(h)(8)] in setting the trial date." *Id.* at 77. We reversed, holding that "the decision to grant an ends-of-justice continuance [must] be prospective, not retroactive; an order granting a continuance on that ground must be made at the outset of the excludable period." *Id.* We stated in *Tunnessen* that in the July 6 Decision and Order "the district judge set defendant's trial date outside the limits of the Act without making *any* ends-of-justice findings on the record." *Id.* (emphasis added). Moreover, no party had requested that such a continuance be granted at that time. The earlier order of May 29 excluding time concerned only time already spent in preparation; it did not refer to the need for additional time beyond May 29. We therefore concluded that "[d]efense counsel's consequent inability to respond until after the fact to the district court's assertion that they needed more time renders problematic the task of evaluating the court's [October 12] ends of justice findings." *Id.* at 78. Despite the reversal, however, we were careful in *Tunnessen* to state that "the precise reasons for the decision [to grant a continuance] need not be entered on the record at the time the continuance is granted." Instead, we adopted the rule established in other circuits that, "[a]lthough the district court must decide initially whether to grant [an ends-of-justice] continuance, . . . the purposes of the statute are satisfied by a subsequent

articulation." *United States v. Brooks*, 697 F.2d 517, 522 (3d Cir. 1982).

In *Kelly*, we applied the teachings of *Tunnessen* again in a situation where the district court set a trial date outside the Speedy Trial Act's time limit. Reviewing the record in that case, we determined that before granting the continuance, the district judge's findings referred only to the scheduling considerations of defense counsel and the government. 45 F.3d at 47. On those facts, we found the judge's later nunc pro tunc conclusion that the continuance had been granted in the "interests of justice" unavailing. *Id.* Clearly under *Tunnessen*, contemporaneous findings devoid of any reference to speedy trial concerns and which relate exclusively to scheduling matters are not sufficient evidence of the district court's intention to grant an ends-of-justice continuance.

A careful examination of the record of the May 25 conference in this case reveals the following. In granting a continuance until early November, the judge was clearly focusing on the factors involved in applying the Speedy Trial Act. He acknowledged the importance of bringing the case to trial quickly but was mindful of defense counsel's need for additional time to prepare; the demands of the Speedy Trial Act were very much the subject of discussion with the court by defense counsel, whether retained, assigned or "standby". It is true that Breen did not affirmatively agree on the record with the statement of his standby counsel, Fleming, that he did not believe that "anybody" would object to a November trial date. Nor do we suggest that Breen "waived" his speedy trial claims since he had "no obligation to take affirmative steps to insure that [he] would be tried in a timely

manner." *Tunnessen*, 763 F.2d at 79. We mention this only to make clear that everybody knew what was going on: The judge was determining how much time to exclude from the speedy trial clock after listening to all the parties. Indeed, counsel for co-defendant McKinney specifically referred to "exclusion of time". Moreover, the ends-of-justice analysis and exclusion of the period from May 25 to the November trial took place well before the speedy trial clock had run.[5]

Relying on *Tunnessen* and *Kelly*, Breen claims that during the May 25 conference, the district judge erred by never mentioning the words "ends of justice" and by failing to explicitly perform the requisite balancing between the "ends of justice served by the granting of such continuance" and "the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). However, as already indicated, this case is quite different from *Tunnessen* and *Kelly*. The parties and their counsel all understood from the May 25 colloquy fixing the trial date in open court that the judge was concerned over speedy trial considerations, that the time until trial was being excluded and that various interests, including the needs of counsel for more time to prepare, were being balanced against the concern over delay.

We continue to stress that whenever possible the district court "should make the findings required by § 3161(h)(8)(A) at the time it grants the continuance." *Tunnessen*, 763 F.2d at 79. A contemporaneous finding on

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[5] In view of Breen's admissions in the district court, see note 1 supra, there is no merit to his argument to us that by May 25, many more than four days had run.

the record aids appellate review and also puts the parties on notice that the speedy trial clock has been stopped. *Kelly*, 45 F.3d at 47. But a trial is neither a game nor an obstacle course; failure to utter the magic words "ends-of-justice" at the time of ordering the continuance is not necessarily fatal. In short, we are convinced by the record that in granting the continuance on May 25, the trial court considered the factors indicated in § 3161(h)(8) and performed the required balancing of interests. We will therefore not upset the exclusion of time.[6]

B. Alleged juror misconduct

Breen cites two instances of alleged juror misconduct. The first relates to statements made by juror Harris and alternate juror Slayton. During the trial, Harris and Slayton each asked the court clerk whether the defendants would be taken into custody immediately if they were convicted. Upon learning of these comments, the district judge conferred with counsel and elected to discuss the matter individually with the jurors in the presence of counsel and defendant Breen. In response to the judge's questions regarding his statements, Harris elaborated: "they've been running free all this time and I was just wondering if they would be taken into custody if they are convicted." At the close of the colloquy with the jurors, Breen moved for a mistrial, or in the alternative

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[6] Breen also argues that the district court improperly allowed stand-by counsel to waive Breen's rights under the Speedy Trial Act. Because we find that the court properly excluded the time following the May 25 conference under § 3161(h)(8), we need not address this argument.

for the dismissal of Harris and Slayton from the jury. The motion was denied.

We review the district court's denial of Breen's motion for dismissal based on alleged juror misconduct for abuse of discretion. *United States v. Thai*, 29 F.3d 785, 803 (2d Cir. 1994). "[A] reviewing court will only find abuse of that discretion where there is bias or prejudice to the defendant." *United States v. Purdy*, 144 F.3d 241, 247 (2d Cir. 1998) (internal quotation marks and citations omitted).

Breen argues that the jurors' comments demonstrated a bias and prejudgement of his guilt. According to Breen, such bias deprived him of a fair trial. We agree that these statements raised a question of potential bias. However, the district judge did not ignore this danger. Instead, in the presence of counsel and Breen, the judge questioned Harris and Slayton regarding their statements and received assurances that neither had made up his mind on the case or had discussed it with other jurors. The judge found that both were "forthright and candid," that Harris "remains a fair and impartial juror" and that "there is no indication that Slayton . . . is in any way unfit to serve as a juror."[7] Because the trial judge is in the best position to assess the demeanor and credibility of the jurors, on these facts we do not find an abuse of discretion.

Breen's second allegation of juror misconduct involves the dismissal of another juror without defense

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[7] Harris was already a member of the jury. Slayton was an alternate and never became a juror.

counsel's consent. During trial, the juror informed the court that he had received word from his own attorney that the United States Attorney's office wanted to speak with him regarding an ongoing criminal investigation. Thereafter, the district judge met ex parte with a representative of the United States Attorney's Office to discuss the matter.[8]

After the ex parte meeting and in the presence of counsel and Breen, the judge questioned the juror about the truthfulness of his responses during voir dire, but did so without revealing any details of the ex parte communication. The juror conceded that he had lied during voir dire. He also told the judge in the presence of defense counsel that he had not spoken to any other juror about his problems with the government. The judge then dismissed the juror and replaced him with an alternate. The information revealed by the United States Attorney's Office was placed in a sealed record.[9]

Breen claims that the district court abused its discretion in deciding to dismiss this juror without the consent of defense counsel. He cites *Remmer v. United States*, 347 U.S. 227 (1954), in support of this argument. In *Remmer*, an unnamed person made a potentially prejudicial contact with a juror. The trial judge heard about it from the juror, advised the prosecutor, allowed the FBI to investigate and report to him and the prosecutor and then decided not to dismiss the juror. All of this was done

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[8] The representative was not the prosecutor against Breen.

[9] We have examined the sealed record and find no evidence therein that the district judge abused his discretion in excusing the juror.

without advising, or consulting with, defense counsel or the defendant, who learned about the incident only after the jury returned its verdict. The Supreme Court remanded the case to the district court with directions to determine after a hearing whether "the incident . . . was harmful to the [defendant]." 347 U.S. at 230.

The situation here is quite unlike what happened in *Remmer.* Counsel and Breen were informed of the problem, after which the judge questioned the juror in their presence and the juror admitted that he had lied on voir dire. It is true that Breen objected to dismissal of the juror but we have previously upheld dismissal of a juror in a case where all defense counsel were not given the opportunity to be heard. *United States v. Moten,* 564 F.2d 620, 629 (2d Cir. 1977) ("It is well understood that the substitution of an alternate juror for reasonable cause is the prerogative of the court and does not require the consent of counsel."). We see no reason to deviate from this rule here.

Breen also argues that the judge abused his discretion by meeting ex parte with the United States Attorney's representative and not sharing with defense counsel thereafter the information he had learned about the ongoing criminal investigation. In view of the juror's admission to the judge, in the presence of counsel and Breen, that he had lied, it is clear that the judge did not abuse his discretion.

C. Sentence enhancements

Breen claims that the district court violated his rights under the Fifth and Sixth Amendments by increasing his prison term based on the quantity of drugs he allegedly shipped and his alleged possession of a handgun. The district court made these findings at sentencing using a preponderance of the evidence standard. Breen contends that the resulting enhancements increased his sentence beyond the maximum otherwise applicable and that, under the holding of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), only the factfinder, using the beyond a reasonable doubt standard, can establish the factual basis supporting the imposition of such additional imprisonment.

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory* maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-63 (emphasis added). The lowest statutory maximum for Breen's conviction under 18 U.S.C. § 841(a)(1) is 20 years imprisonment, precisely the term he received post-enhancement.[10] According to Breen, the "maximum" sentence otherwise applicable would be the top-end of the guidelines range for the offense committed, absent the enhancements. Based on our reading of *Apprendi*, we reject this argument. The hypothetical "maximum" urged

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[10] 18 U.S.C. § 841(a)(1) provides for various statutory maximums, ranging from 20 years to life imprisonment, based on the quantity of drugs involved.

on us by Breen is simply not the statutory maximum and is not consistent with the language chosen by the Court. *See United States v. Garcia*, No. 00-1408, 2001 WL 167018, at *1 (2d Cir. Feb. 20, 2001).

D. Defendant's other claims

Breen argues that the district court committed numerous other errors which require reversal of his convictions. The alleged erroneous rulings include the judge's decision not to dismiss the firearm charge on which Breen was ultimately acquitted; the denial of Breen's motion to suppress evidence; the refusal to grant Breen's request for funds for an expert witness; the denial of Breen's request for a hearing to determine whether the government's surveillance in this case had violated his rights under the Fourth Amendment; and the decision to allow the government to call witnesses participating in cooperation agreements. We have considered each of these arguments and find that they are without merit; no further discussion of these issues is warranted.

We have considered all of the defendant's arguments and find that none of them require reversal. For the reasons stated above, we affirm all of Breen's convictions.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of May two thousand one.

USA

v

Breen

Dkt No: 00-1241

(Filed May 15, 2001)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Christopher Breen.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX C

Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

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21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture of substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-

piperidinyl] propanamide or 100 grams or more of a mixture of substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual

or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18,

or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samatha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death

or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorize din accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provided for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one

kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provision of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony

under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such a person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (A) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

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21 U.S.C. § 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical, offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a

minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture of substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of

prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

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§ 2D1-1, Guidelines Manual

PART D – OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A),

(b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine

from listed chemicals that the defendant knew were imported unlawfully, and (b) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

Level 38

(1)
- 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- 1.5 KG or more of Cocaine Base;
- 30 KG or more of PCP, or 3 KG or more of PCP (actual);
- 15 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of "Ice";
- 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- 12 KG or more of Fentanyl;
- 3 KG or more of a Fentanyl Analogue;
- 30,000 KG or more of Marihuana;
- 6,000 KG or more of Hashish;
- 600 KG or more of Hashish Oil.

Level 36

(2)
- At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 500 G but less than 1.5 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of "Ice";
- At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil.

Level 34

(3)
- At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);

- At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 150 G but less than 500 G of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";
- At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens):
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil.

Level 32

(4)
- At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

- At least 50 G but less than 150 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less tha 300 G of "Ice";
- At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil.

Level 30

(5)
- At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 70 G but less than 100

G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";

- At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil.

Level 28

(6)
- At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 20 G but less than 35 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);

* * *

Level 12

(14)
- Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

- Less than 250 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of "Ice";
- Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances;
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

Level 10

(15)
- At least 1 KG but less than 2.5 KG of Marihuana;
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;
- At least 62 but less than 156 units of Flunitrazepam;

- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

Level 8

(16)
- At least 250 G but less than 1 KG of Marihuana;
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;
- At least 250 but less than 1,000 units of Schedule I or II Depressants or Schedule III substances;
- Less than 62 units of Flunitrazepam;
- At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- 40,000 or more units of Schedule V substances.

Level 6

(17)
- Less than 250 G of Marihuana;
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 250 Units of Schedule I or II Depressants or Schedule III substances;
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

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§ 3B1.1, Guidelines Manual

PART B – ROLE IN THE OFFENSE

Introductory Commentary

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense.

The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), i.e., all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

When an offense is committed by more than one participant, § 3B1.1 or § 3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (*see* Appendix C, amendment 345); November 1, 1992 (*see* Appendix C, amendment 456).

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or ~~leader of a criminal activity that involved~~ five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisory (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

Commentary

Application Notes:

1. *A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (**e.g.**, an undercover law enforcement officer) is not a participant.*

2. *To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.*

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18 U.S.C. § 3161

* * * the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time

for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed on hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month prior such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> **(1)** Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –
>
> > **(A)** delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which

any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the

date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the

existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

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18 U.S.C. § 201

* * * to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever –

(1) otherwise than as provided by law for the proper discharge of official duty –

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act

performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon

whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1504 of this title.

* * *

Rules of Evidence

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

APPENDIX D

U.S. District Court
Western District of New York (Rochester)

No. 93-CR-7216

USA v. Christopher Breen

* * *

[484] Mr. Breen, before we bring the jury out I did give you the opportunity to present some law to me concerning the issue that was raised yesterday and that specifically is Mr. Knapp's contention that Count One only requires the proof of cocaine and not a specific amount.

You maintain that it would require him to prove the five kilograms alleged in the indictment.

MR. BREEN: There's been recent Supreme Court decisions, Your Honor, on Almendarez-Torres –

THE COURT: Okay. Hang on one second.

Go ahead.

MR. BREEN: Almendarez, A-L-M-E-N-D-A-R- –

THE COURT: A-L-M-E-N –

MR. BREEN: – -D-A-R-E-Z dash Torres, T-O-R-R-E-S.

THE COURT: What's the cite?

MR. BREEN: 118 S.Ct. 1219, 1998.

THE COURT: 1219. At what – since it may be a rather lengthy decision – at what page is the language that you think supports you?

MR. BREEN: Well, I didn't have access to a Federal law library, Your Honor. I just got this stuff last night. It's in an argument here and it didn't delineate the page.

THE COURT: In an argument where, Mr. Breen?

MR. BREEN: This argument is in the Federal Public Defender, that hits right on the issue.

[485] THE COURT: And what's the Federal Public Defender?

MR. BREEN: It's a publication put out by the public or Federal Public Defender's Office.

THE COURT: And what issue is it?

MR. BREEN: It has to do whether these –

THE COURT: No. I mean, give me the date, the time.

MR. BROWN: It's the most recent one, Judge.

Judge, just so we move along. It's the Federal Public Defender Report. It's dated October 1999. It's Volume 80, Number 3, published in this district, Judge.

And I'm sure at the break Mr. Breen could just hand it up.

MR. BREEN: It's the article that addresses the issue, Judge.

THE COURT: And it's your position, Mr. Breen, that that stands for your proposition that Mr. Knapp has to prove the amount stated in Count One?

MR. BREEN: Yes, Your Honor.

THE COURT: All right. The Court will review it.

Let's bring the jury in.

MR. KNAPP: Your Honor, if I might, just a housekeeping matter. I've spoken with Mr. DePippo and I have two essentially brief foundation witnesses regarding the repackaging of the cocaine into those four bulk bags.

* * *

[575] between today and Friday and tell me what position you're going to take.

MR. BREEN: Yes, Your Honor.

THE COURT: Fair enough?

MR. BREEN: Yes.

THE COURT: Let's move on.

Let's get the jury.

MR. KNAPP: Just in that regard, Your Honor, the – and I'm sure Mr. Breen understands – but part of the decision involves, of course, the movement of people.

Now, we're in the process of – because he didn't want to stipulate to the chemist, we have one chemist we're trying to pin down to appear on Friday to talk about their analysis. The other one has indicated they can't get here on Friday so they will probably be a continuation of the Canadian evidence next Friday.

THE COURT: Well, you'll certainly have time to call them off.

Mr. Breen, think about it. And by the way, that doesn't mean that you're not preserving your right to object to whether or not the fact that the Government has charged an amount is an element of the offense. Although, obviously, if you stipulate to the cocaine it becomes –

MR. BREEN: That's why I'm not stipulating to the cocaine, Your Honor.

* * *

[568] not, then we can certainly dispense with a lot of the chain.

And, Mr. Breen, and I may be wrong, but I had the impression that based on some of the requests that were made for stipulations, that you intend to contest the chain of custody; is that correct? Incorrect?

MR. BREEN: The only thing that I contest is in my motion work that I handed in, that I handed up this Federal Public Defender article and the fact that it's not just case authority but it's a factual issue in the motion. Once you rule on that, that'll be it.

THE COURT: No. That's different then [sic] the chain of custody.

I had a chance to look at the article from the Federal Public Defender as well as the case it talks about. And, essentially, it seems to be suggesting that – Mr. Knapp, I'll provide you a copy so you can address it.

It seems to be suggesting that although the law is as Mr. Knapp says, that it's not so clear that the law is not

going to change the next time the Supreme Court gets a chance to address the issue.

But, however, that has nothing to do with the, to me, with the chain of custody on the items. Whether or not he has to prove because he charged it in the indictment five kilograms or more of cocaine or fifteen, I think it was, kilograms or more of marijuana, whatever it is, doesn't have

* * *

[650] What clearly I meant was if for some reason, because of the Government's fault, the cocaine was not available on that date, then I wouldn't let it in.

The cocaine was available.

We're now in a debate over whether you should have been allowed to take – examine each of the bags before you chose to take a sample. Or and/or whether you should have been allowed to take samples from all of the bags.

MR. BREEN: Your Honor, could I just finish this little part here?

THE COURT: You certainty can, Mr. Breen.

MR. BREEN: Mr. Knapp is the one that's got the burden; he wanted it admitted into evidence. He didn't allow the testing. He should have called you. He sent a letter to me; why didn't you get a carbon copy? And that's ail I have to day. [sic] I just relied on the transcript and what you said.

He's got the burden.

THE COURT: Now, part of the Court's consideration in making a ruling on this had to do, Mr. Breen, with your representations that in order to establish the charge under Count One of the indictment, that Mr. Knapp would have to prove that you possessed, and the amount of the cocaine, I recall, is five kilograms or more. Was the marijuana fifteen?

[651] MR. KNAPP: I believe it's 100 kilos or more.

THE COURT: One hundred kilograms or more. I stand corrected.

And your argument was in order to find you guilty under that Count the Jury would have to find specifically with respect to the cocaine that you possessed five kilograms or more, making testing of all the bags imperative for you on a determination of guilt or non-guilt by the Jury.

Does that fairly state what your initial position was to me?

MR. BREEN: Initially, yes. But the five kilograms was in the pleading and was read to the Jury. That's why Now Mr. Knapp has the burden of proving there were five kilograms of cocaine, not just one gram out of one bag.

THE COURT: And what's your authority for that?

MR. BREEN: And that's in direct relation, Your Honor, to the authority that I provided to the Court this morning.

THE COURT: But tell me, because I do have the copy in front of me. So refer to me what, is your authority.

MR. BREEN: Jones.

Just one second, Your Honor, please.

THE COURT: Yes.

MR. BREEN: Two cases. The two cases were [652] Almendarez-Torres and Jones.

In Jones specifically in that case there was a carjacking and with great bodily injury or severe or assault. It became that there were three levels for that crime, Federal crime.

In this you could have different levels under the sentencing guidelines and under the actual charges. The Supreme Court has left open whether the amounts that are now being offered into evidence are going to play an actual elements [sic] in the definition of a Federal crime. And it's open to interpretation right now.

That is the authority I can provide.

THE COURT: But I want to note and I want to read something from – and essentially you were candid with me that you're relying on what's called the Federal Public Defender Report, Volume 8, Number 3, by the Federal Public Defender, Western District of New York, October 1999.

In pertinent part – although on page 6 it reads: Drug quantity as an element. It says, quote, "In light of the holding in Jones, Federal practitioners should challenge

anew. All aspects of the current practice of treating drug quantity as a sentencing factor rather than an element."

It goes on to list a number of ways this should be challenges, [sic] but footnote 2 after the sentence I just read, it says: Last term the Supreme Court faced but did not [653] decide the constitutionality of this practice in *Edwards v. United States,* 118 S.Ct. 1475 (1998), avoiding the issue because the actual sentence received by the petitioners were within the lowest statutory penalty range.

I would note the case of *United States v. Moreno,* at 181 F.3d 206, which is a Second Circuit case in which cert. was denied on November first of 1999.

At footnote number 4 of that decision it says, "The Government also suggests that because the indictment in this case charged the defendants with trafficking in a sufficient quantity of either substance to give rise to a violation of 21 U.S.C. Section 841(B)(1)(A) Barnes and Arosco Preda, are not applicable."

We have previously stated that, "Quantity is not an element of the crimes prescribed by section 841(A). *United States v. Campazano,* 905 F.2d 677, 679 2d Cir., citations omitted, cert. denied, 4498 U.S. 947. And the District Court charged the jury in accordance with this principle.

The quantity relates solely to sentencing. *United States v. Madcowar,* 930 F.2d 234, 237, Second Circuit, cert. denied, 502 U.S. 911.

And to the extent that an indictment alleges that a particular quantity of drugs is involved or specifically

charges a provision of 21 U.S.C. 841(B), the effect is only to put the defendant on notice that the enhanced penalty [654] provisions of Section 841(B) may apply."

That language seems pretty clear, Mr. Breen, as to what – and I don't know that I could get a much more recent case than cert. denied November first 1999.

So I'm obviously required to follow the Second Circuit law which, in effect, means that if you had any cocaine, that the jury could legitimately find you guilty under Count One. And the amount of cocaine for purposes of finding of guilt or non-guilt does not really become relevant. Therefore, the Court finds you had an opportunity to test some of the cocaine.

I understand – and the Court, let me say this, the Court attributes a lot of what happened on June 4 of 1999 to confusion.

However, the Court finds that the Court's order was complied with. The cocaine was there. It was available for you to take a sample from any bag.

I'm not attributing any bad motives to you, but for whatever reason, you chose not to do it at that time but rather to bring a motion in limine and then another motion in limine to dismiss.

So your motion not to allow the cocaine into evidence is denied. However, it's certainly a bridge that we can recross if you're convicted, in terms of sentencing.

In other words, Mr. Knapp indicated in his initial [655] argument and this case that I referred to makes clear, that the amount of cocaine is certainly relevant on sentencing. If you are – if you are convicted, and that – if

you're not, then this all becomes academic. But if you are convicted then certainly I'll allow you to revisit the issue in terms of, perhaps, matters relating to sentencing.

In other words, I'm saying, I mean, you may have an argument if – and that may come down to this factual issue. From my point of view, if you told Mr. Knapp, as he represented, that all you wanted to do was take a sample from the bag of your choosing, then if that's the case then I would find that what happened certainly did not, was not to your detriment in any way.

However, on the other hand, if you specifically requested of Mr. Knapp that you be allowed to take samples from each of the bags, then that's another question for the Court because I think that very well could impact on sentencing.

In other words, as far as I'm concerned, if you wanted to you had every right to try to determine if, in fact, there was as much cocaine as the Government alleges in terms of sentencing.

Now, to the extent that that becomes an issue it may be resolved if you are convicted if you have a chance to test the cocaine.

[656] We've established – I've rarely seen a case, at least up to this point, where we've had a chain of custody established with such painstaking detail as has been established in this case up to now.

So to recap. Your application is denied. It may be that you can make additional arguments at time of sentencing. You can have an exception to the Court's ruling.

Which now leads us to the second issue. If you want to continue to challenge the chain of custody, as I told you, that's your call. You're the individual who is on trial in this case. And even though – and this Court is here to protect your rights as everyone else's rights. And if you want to continue to attack the chain, that's absolutely your right and you go ahead and do it.

On the other hand, if you feel strategically because of the defense that you at least appear to interpose in your opening statement, that it doesn't make much sense to attack the chain in terms of a determination of guilty or non-guilt on the part of the jury, then you can do that as well.

Do you understand that?

MR. BREEN: Yes, I do, Your Honor.

Mr. Fleming has requested me to ask the Court if he could be allowed to address the Court for a moment.

APPENDIX E

U.S. District Court
Western District of New York (Rochester)

No. 93-CR-7216

USA v. Christopher Breen

Court's Charge

* * *

[2901] chemist who has done a chemical analysis of the material.

Circumstantial evidence would be evidence from which you could infer that the material was the controlled substance named in the count such as testimony concerning the names used by the Defendant to refer to the material or testimony about the material's appearance.

Whether the Government relies on direct or circumstantial evidence to prove that the material in issue was, in fact, the controlled substance named in the count, it must prove so beyond a reasonable doubt.

You are instructed as a matter of law that cocaine is a Schedule 2 controlled substance and marijuana is a Schedule 1 controlled substance.

You must ascertain whether or not the material in questions is, in fact, the controlled substance named in the count. In doing so you may consider all the evidence in the case including the testimony of any expert or other witness who may have testified either to support or dispute the allegation that the material was the controlled substance named in the count.

If you find that the material was, in fact, the controlled substance named in the count you need not be concerned with the quantity. So long as you find that a Defendant named in the count knowingly distributed or possessed with intent to distribute the controlled substance [2902] named in the count, the amount involved is not important.

As I have instructed you, you must find the Defendant named in the count possessed drugs.

The legal concept of possession may differ from the everyday use of the term so I will explain it [sic] some detail.

Actual possession is what most of us think of as possession, that is, having physical custody or control of an object. For example, if you find that a Defendant had the drugs on his person you may find that he had possession of the drugs. However, a person need not have actual physical custody of an object in order to be in legal possession of it.

If the individual has the ability to excess [sic] substantial control over an object that he does not have in his or her physical custody, then he or she is in possession of that item.

An example of this from everyday experience would be a person's possession of items that he keeps in a safe deposit box at his bank. Although the person doesn't have physical custody of the items, he exercises substantial control over them, and so has what we know as constructive possession of them.

Possession of drugs cannot be found solely on the ground that a Defendant was near or close to the drugs. Nor can it be found simply because a Defendant was present at

* * *

APPENDIX F

U.S. District Court
Western District of New York (Rochester)

No. 93-CR-7216

USA v. Christopher Breen

Court's Charge

* * *

[2889] Leon, and Boyd Blair McKinney are charged with a violation of Section 846 of Title 21 of the United States Code.

Specifically, the indictment charges the Defendants with conspiracy to possess with intent to distribute and to distribute the controlled substances of cocaine and marijuana.

Count 1 reads as follows:

"Beginning in or about September, 1991, the exact date being unknown to the Grand Jury, and continuing to in or about February, 1992, in the Western District of New York and elsewhere, the Defendants, Christopher Breen, Shawn Leon, and Boyd Blair McKinney did knowingly, willfully, and unlawfully combine, conspire, and agree together and with others, known and unknown, to commit offenses against the United States.

That is, to possess with intent to distribute and to distribute five kilograms or more of a mixture or substance containing cocaine, a Schedule 2 controlled substance, and 100 kilograms or more of a mixture or substance containing marijuana, a Schedule 1 controlled substance, in violation of Title 21, United States Code,

Sections 841(a)(1), 841(b)(1)(A), and 841(b)(1)(B); all in violation of Title 21 United States Code, Section 846."

That is how the indictment reads as to Count 1.

Now, in order to satisfy its burden of proof the

* * *

[2896] This is so even if such acts were done and statements were made in the Defendant's absence and without his knowledge.

However, before you may consider the statements or acts of a co-conspirator in deciding the issue of a Defendant's guilt you must first determine that the acts and statements were made during and in furtherance of the unlawful scheme.

If the acts were done or the statements made by someone who you do not find to have been a member of the conspiracy or if they were not done or said in the furtherance of the conspiracy, they may be considered by you as evidence only against the member who did or said them.

I now want to turn our attention to the remaining counts in the indictment, with the exception of Count 6.

Counts 2, 3, 4, 5, 7, 8, 9, and 10 charge a named Defendant or Defendants with possessing with intent to distribute and distributing a quantity of a controlled substance, either cocaine or marijuana depending upon the count.

Now, I'm going to read to you each of the counts in the indictment. And, as I said, you will get the indictment, so you can listen closely and don't have to really be

concerned about writing anything down as I read each of the counts. Obviously, once I get down with the [2897] counts, then I will instruct you on the law.

Specifically, Count 2 reads:

"On or about the 4 and 5 days of September, 1991, in the Western District of New York and elsewhere, elsewhere [sic], the defendant, Christopher Breen did knowingly, intentionally, and unlawfully possess with intent to distribute and distribute a quantity of a mixture or substance containing marijuana, a Schedule 1 controlled substance; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2."

Count 3 reads:

"On or about the 16 and 17 days of September, 1991, in the Western District of New York and elsewhere, the defendants, Christopher Breen and Shawn Leon, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, five kilograms or more of a mixture or substance containing cocaine, a Schedule 2 controlled substance; all in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(A) and Title 18 of the United States Code, Section 2."

Count 4 reads as follows:

"On or about the 10 and 11 days of October, 1991, in the Western District of New York and elsewhere, the defendant, Christopher Breen, did knowingly, intentionally, [2898] and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture or substance containing marijuana, a Schedule 1 controlled

substance; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2."

Count 5 reads as follow:

"On or about the 29 and 30 days of October, 1991, in the Western District of New York and elsewhere, the defendants, Christopher Breen and Shawn Leon, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, five kilograms or more of a mixture or substance containing cocaine, a Schedule 2 controlled substance; all in violation of Title 21 of the United States Code, section 841(a)(1) and 841(b)(1)(A), and Title 18 the [sic] United States Code, Section 2."

Count 7 reads as follows. Remember, we're skipping Count 6 now and I'll return to it.

Count 7 reads as follows:

"On or about the 9 and 10 days of December, 1991, in the Western District of New York and elsewhere, the defendant, Christopher Breen, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture or substance containing marijuana, a Schedule 1 controlled substance; all in violation of Title 21, United States Code, Section 841(a)(1) [2899] and Title 18, United States Code, Section 2."

Count 8 reads as follows:

"On or about the 17 and 18 days of December, 1991, in the Western District of New York and elsewhere, the

defendant, Christopher Breen, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture or substance containing marijuana, a Schedule 1 controlled substance; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2."

Count 9 reads as follows:

"On or about the 22 and 23 days of January, 1992, in the Western District of New York and elsewhere, the defendant, Christopher Breen, did knowingly, intentionally, and unlawfully possess with intent to distribute, and distribute, a quantity of a mixture or substance containing marijuana, a Schedule 1 controlled substance; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2."

Count 10 reads as follows:

"On or about the 3 and 4 days of February, 1992, in the Western District of New York and elsewhere, the defendants, Christopher Breen and Boyd Blair McKinney, did knowingly, intentionally, and unlawfully possess with intent to distribute and distribute $100 [sic] kilograms or more of a [2900] mixture or substance containing marijuana, a Schedule 1 controlled substance; all in violation of Title 21 of the United States Code, Section 841(a)(1) and 841(b)(1)(B) and Title 18 of the United States Code, Section 2."

Now, with respect to each of these counts – that would be Counts 2, 3, 4, 5, 7, 8, 9, and 10 – in order to prove the charge against a Defendant named in the count

the Government must establish beyond a reasonable doubt each of the following three elements of the crime:

First, that the Defendant named in the count possessed the controlled substance named in the count.

Two, that the Defendant named in the count knew that he possessed controlled substance named in the count.

And, three, that the Defendant named in the count distributed or intended to distribute the controlled substance named in the count.

The first thing you must determine is whether a Defendant named in a count possessed the controlled substance named in the count. That is, the Government must prove that the material that the Defendant is charged with possessing or distributing is, in fact, the controlled substance named in the count.

The Government may prove this through either direct evidence or through circumstantial evidence.

An example of direct evidence is the testimony of a

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APPENDIX G

U.S. District Court
Western District of New York (Rochester)

No. 93-CR-7216

USA v. Christopher Breen

* * *

[5] in his letter to the Court of March 6, 2000.

Specifically, Mr. Fleming did explain that he was unable to comply with the dates set in the sentencing guidelines since his meeting with Mr. Knapp and Mr. Martineck of the probation department was unable to occur until March first.

Moreover, as Mr. Knapp explained, both the grounds for a downward departure have become increasingly apparent over the past week from letters of support written on Mr. Breen's behalf by his family and friends.

As earlier indicated, five objections on the part of the Defendant remain outstanding with respect to the pre-sentence investigation report. The Court is prepared to rule on those.

The Court will address them in the order in which they are listed in the addendum of the pre-sentence investigation report.

In resolving these objections it is, of course, well settled that to rule against the Defendant the Government must establish the disputed allegations in the pre-sentence investigation report by a preponderance of the evidence.

United States v. Lee, 818 F.2d 1052 at page 1057, (2d Cir. 1987) Cert. denied, 484 U.S. 956, (1987).

Further, it has long been established that hearsay [6] evidence is admissible at a sentencing hearing and that even though the Defendant challenges the hearsay portion of the pre-sentence investigation report, that evidence not be disregarded if the Government introduces corroborating evidence.

United States v. Weinberg, 852 F.2d 681 at page 685, (2d Cir. 1998).

That is, a sentencing court may rely on hearsay statement contained in a pre-sentence investigation report, although challenged, as long as the court finds, quote, "adequate indicia of reliability," *United States v. Carmona*, 873 F.2d 569 ate page 574, (2d Cir. 1989).

First, the Defendant objects to the amount of cocaine referred to in paragraph 25 of the pre-sentence investigation report. He maintains the amount should be eight kilograms, not twenty kilograms, and that Hector Ruiz, referenced in the pre-sentence investigation report, is not credible.

The Court disagrees and finds by a preponderance of the evidence that the reference in paragraph 25 is accurate and further finds by a preponderance of evidence that the 19 kilograms of cocaine used to calculate the Defendant's base offense level in paragraph 33 of the pre-sentence investigation report is correct.

In making this finding, the Court relies on the

* * *

[11] referenced in paragraph 26 of the pre-sentence investigation report.

Specifically, the Defendant claims that he did not owe Hector Ruiz $200,000 for cocaine and/or over $400,000 for marijuana.

As to this objection the Court determines, pursuant to Federal Rule of Criminal Procedure 32 subdivision 1, that, quote, "No finding is necessary because the controverted matter will not be taken into account or will not affect sentencing," end quote.

Three, the Defendant objects to the application of the two-level upward adjustment of U.S.S.G. Section 2(D)1.1 (B) (1) called for in paragraph 33 of the pre-sentence investigation report because, quote, "A dangerous weapon, including a firearm, was possessed," end quote.

While the Defendant was acquitted of Count 6 in the subsequent indictment which charged that he, quote, "Knowingly, willfully, and unlawfully did use and carry a firearm, that is, a nine millimeter Smith and Wesson semi-automatic pistol, during and in relation to a drug trafficking crime," end quote, it is well settled that acquitted conduct can be considered by the sentencing court.

The Second Circuit has made clear that since an acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced

* * *

[13] there can be little question that the gun was present in Breen's residence during his drug trafficking activities in September through November of 1991.

Application note number 3 to U.S.S.G. Section 2(D)1.1 states, quote, "The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."

In consideration of application note number 3 and based on reasonable inferences to be drawn from all the trial evidence as detailed above, the Court finds by a preponderance of evidence that the Defendant's possession of the loaded Smith and Wesson semi-automatic pistol in the course of his drug trafficking activities does require a two-level upward adjustment as called for by U.S.S.G. Section 2(D)1.1(B) (1), *United States v. Smith*, 174 F.3d 52, (2d Cir. 1999).

Fourth, the Defendant objects to paragraph 36 of the pre-sentence investigation report which calls for a two-level upward adjustment of his offense level pursuant to U.S.S.G. Section 3(B)1.1(c). Since the Defendant was, quote, "An organizer, leader, manager, or supervisor," end quote, in connection with his drug trafficking activities.

Application note number 2 to this section explains,

* * *

APPENDIX H

U.S. District Court
Western District of New York (Rochester)

No. 93-CR-7216

USA v. Christopher Breen

* * *

[15] resolutions, some inquiries as recent as this afternoon.

THE COURT: Again, I don't want to get into the details. I guess that I do want to know, is there something holding up a determination whether it is going to happen? I can't believe it is the testing of the cocaine.

MR. KNAPP: It is not that.

THE COURT: Of the alleged cocaine.

MR. DEPIPPO: Judge, from my prospective I've only been in the case for a couple of weeks. I don't feel like I have had sufficient time to review the file and have meaningful discussions with Mr. Knapp. It is something I would certainly like to have the opportunity to do when the time presents itself.

I guess I would ask the Court how flexible if there is any problem you are with the August 2, trial date, and that is this. Again, I have just come into this case, there are voluminous records from the investigation in Canada and California and here in the Western District, including telephone records that I would like to analyze sufficiently. And it would be very very difficult for me to get up to speed and ready for a August 2 trial, and so if the

Court would consider in putting that off, I would certainly waive any speedy trial consideration.

THE COURT: Sure, Counsel will to have help me out. If you waive your speedy trial rights, does it affect other [16] Counsel. Mr. Leon can substitute Counsel at anytime he wants, but new Counsel coming in essentially has to step into the shoes of the counsel that is replaced. You want to replace Mr. Mahoney with Mr. DePippo, that is fine, but I don't know how it impacts on the other defendants.

To answer your question, if this has to be adjourned, I have a complicated three week civil trial starting in September, so we are not looking to do this then until sometime in October at the earliest.

So that is what we're facing. If everyone wants that, I have to tell you honestly it bothers me that I am looking at a 1993 case. I have come to be less shocked that there are civil cases that are hanging around that old to try. But a 1993 criminal case does concern me.

So I don't know, what are your positions?

MR. FLEMING: Judge, if I could be heard on Mr. Brown's behalf as well, we are here on an assigned basis. The August 2, date would be very inconvenient, I would do it if the Court directed it, although there were some preliminary discussions before hand. Especially in light of Counsel's recent entry, I don't believe anybody is going to object to a November 1, trial date if need be, and waive any and all necessary speedy trial orders or speedy trial concerns with respect to that.

I could do it the first week of October, I couldn't [17] do the last two that kind of screws us up. I don't know much about the case, I have been standing by for six years, but I think it is a 2 to 3 week trial. I don't think it is one-week trial.

THE COURT: Mr. Brown.

MR. BROWN: Judge, if I may, Mr. McKinney is here, we would certainly be agreeable to excluding the time. Judge, that November 1, date works for me. I have kind of a big civil case that begins early in October. I was going to suggest the tail-end of October, but I understand –

THE COURT: Again, I appreciate the fact Mr. Fleming and Mr. Brown that you are here on an assigned basis.

I will take a look at my calendar. Mr. Knapp, do you have any objection?

MR. KNAPP: I do not, Your Honor.

THE COURT: Now, let me ask you this; in terms of I am going to set a date where I indicated if you want to pled it out, if there are plea agreements you work out that is fine, but after that I would not consider it. What's realistic?

MR. BROWN: Forgive me for interrupting, If I can throw something out with respect to pleas. There is a problem the Defendants have with respect to pleas. I am sure no one has committed to a plea but there are

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APPENDIX I

U.S. District Court
Western District of New York (Rochester)

No. 93-CR-7216

USA v. Christopher Breen

* * *

[755] then, tomorrow, and I think it's a fair resolution, is bring her in. Certainly if she indicates she's in too much pain to sit, then we'll consider excusing her at that time.

MR. DEPIPPO: Judge, the only other concern is at some point can we find out what time her Tuesday appointment is and let her know we'll make reasonable accommodations.

THE COURT: Yes. We should have mentioned that.

If you'll remind me, Mr. DePippo, that's a very good point. We'll discuss that tomorrow.

Maybe with two days notice she can reschedule her therapy for sometime, you know, after the close of proof.

Counsel, let's at least proceed. I have another matter but I did want to go through the motions that were outstanding.

I do want to start with, Mr. Breen, your motion, your 3030 motion.

And, Mr. Breen, why don't you come up to podium and, Mr. Knapp, why don't you come up to the podium.

Mr. Knapp, why don't you come up to the other podium.

Mr. Breen, from what I understand, and there doesn't seem to be any dispute, that you maintain that as of June 4 of 1999, there were 66 days left on the speedy trial clock. Is that correct?

MR. BREEN: I believe as of May 25 there was.

[756] THE COURT: May 25, I'm sorry, there was 66 days on the speedy trial clock. Do you dispute that in an any way, Mr. Knapp?

MR. KNAPP: No, Your Honor.

THE COURT: So we know that on 5-25 there were 66 days left on the speedy trial clock.

MR. BREEN: May I say something, Your Honor?

THE COURT: Yes.

MR. BREEN: I just spoke to with an expert in this area this morning and there possibly could not have been at that point 66 days from what I was told that Magistrate Foschio and the District Court Judge Skretney may have erred in Buffalo so that there possibly was not 66 days and the time had run. But I'm not sure because I didn't have time before I get here today to really go over the docket.

THE COURT: All I can go by is what you've alleged, that is 66 days.

But your argument is that because of the fact that you were not allowed to sample the cocaine in the manner that you wished on June 4 of 1999, that the speedy trial clock began running on that date; is that correct.

MR. BREEN. No. That was just something that I put in there.

The clock really – discovery issues do not prevent the clock from running.

[757] As of May 25, unless the time was excluded, the clock started to run. I just put that in there to tie it in with the other motions.

THE COURT: What's your position?

MR. BREEN: The position is that the clock started to run on May the 25 for this. Was that the clock started to run on May the 25 and that when the trial was scheduled even on August the 2, that would have violated the 70 day rule.

And but then we went to November the first so it violated it even more.

Then it went to November the 8.

But what I found out today is that because all these –

THE COURT: Slow down a little, please.

MR. BREEN: Sorry, Your Honor.

Because of the exclusions that occurred in Buffalo for the motions practice and the standard orders that were issued, I believe through the case law, which I haven't had to chance to check, that Buffalo erred in their waiving of my speedy trial rights.

So it's really a two-part argument.

I just found out about part two today. But the real part one was that the 70 days had expired even initially if

the trial would have been held August the 2. [758] And it definitely expired by November the 8.

But if I got a chance to look at the docket I could possibly find, with this case law, that this time has already expired before we ever even came to your courtroom, Your Honor.

THE COURT: In other words, you're saying it's expired before the first appearance before me?

MR. BREEN: Yes, Your Honor. And the previous six years.

THE COURT: What's your position, Mr. Knapp?

MR. KNAPP: Well, first of all, I should point out that both of the grounds now alleged are not the grounds alleged in his papers. In his papers he specifically triggered that running of the clock after our appearance in court on May 25 because of a failure, an alleged failure of discovery at the June 4 discovery proceeding. Which we've discussed in considerable detail otherwise.

These two new motions have never been brought to the Court's attention. And my position is because they were not brought to the Court's attention before the jury was sworn, they've been waived.

In any event, I don't know what the Defendant's expert is telling him except that as I put in my papers, it was my understanding – and I now say this to the Court that I believe that from the time the Defendant was arraigned in [759] this court – I'm sorry, arraigned on these charges until even today, there have been motions

of one sort or another pending virtually continuously by one Defendant or another.

Now, there were times when Breen did not have motions pending, but a severance hadn't been granted and he at no point felt any reluctance to jump in, join other defendant's motions, file new motions himself. And the case has been continually litigated from day one. And so the Defendant could have, should have raised it, he didn't, he waived it.

With regards to the speedy trial motion he did make before the start of trial he clearly hinged it to his complaint about the discovery proceeding, as I said in my motion papers. It appeared to me that by refusing to follow up on his promise to bring it to the Court's attention, my invitations that he bring it to the Court's attention, my attempts to call him and resolve the discovery issue, I think he was intentionally lying low and intentionally trying to run the clock so that he could stand up and say there was a discovery problem and the time has now gone.

That was his posture. I think that was his tactic. I think it's clear from his motion.

Since then he's now been, as he says, talking to an expert. And it's occurred to him that there may have been other grounds that he could have or should have asserted at [760] some earlier point in time and did not.

And my position is that they've been waived, Judge. They're without merit.

And I would simply also then point out to the Court that the speedy trial provisions that even if there had

been found a point in time in which 70 days or more had run with regards to Mr. Breen, the clock has not run with regards to the other co-defendants and certainly not with regards to Mr. Leon, because this Court had control of the conclusion of Mr. Leon's pre-trial motions and had us over in court when Mr. Leon obtained new counsel and thereafter adjournments were granted, if for no other reason, to allow Mr. Leon the opportunity to have continuity of counsel and give Mr. DePippo the opportunity to prepare for trial.

But the same token, Judge, the record is clear on May 25 Mr. Breen was not alone and all counsel made it clear on the record that an adjournment of the trial date to November first was for their convenience, to serve the ends of justice. The Court alerted them that there would be speedy trial implications unless everybody agreed to waive them, and they did.

So the motion is spurious and should be denied out of hand.

MR. BREEN: Your Honor, may I say something?

THE COURT: Yes.

[761] MR. BREEN: First of all, I've asked Mr. Fleming to come up to the podium for my assistance in this discussion. So I'd like to make a note on the record of that.

Secondly, I resent Mr. Knapp's implication or inference that I in anyway avoided him and his phone calls, because I've been in constant contact with Mr. Knapp and the Court throughout this whole trial. I am not trying any dilatory tactics here.

And I also resent the fact that Mr. Knapp stated that I have employed experts in this area.

I had a call from a gentleman who isn't even a lawyer, this morning.

THE COURT: Believe me, I'm not swayed one way or the other.

But the issue, as Mr. Knapp said, you didn't raise it before trial, you waived it. You can't now come in on grounds that you didn't raise and essentially whether you – whether it's inadvertently or by ambush, raise a ground now.

MR. BREEN: The motion was filed, a Defendant cannot waive his speedy trial rights. It's as clear as that.

The case law is simply under Kelly. This right on point with Kelly; it couldn't be any clearer. And Tunneson, that it is right on point, Your Honor.

And Mr. Knapp can't – the actual code is there, 18

* * *

APPENDIX J

U.S. District Court
Western District of New York (Rochester)

No. 93-CR-7216

USA v. Christopher Breen

* * *

[2274] do want to thank you for that attention and courtesy.

Have a great weekend. We will see you back here Monday at 9:30.

Everybody drink a lot of orange juice and chicken soup and no one get sick over the weekend. Have a good weekend.

Jury's excused. Court will remain in session.

(JURY EXCUSED.)

THE COURT: Counsel, from the Court's recollection there remains, really, three outstanding issues: One, the speedy trial motion. The Court will address that Monday morning at 8:30.

Actually, perhaps, four.

The Court reserved on one of the cashier's checks from Government Exhibit 133 and the Court will rule on that on Monday as well.

The Court indicated at the bench conference that it would give Counsel some time to think about if they do want to make a Rule 29 motion for judgment of acquittal. And if they do, I would give you until Monday to make that.

And, finally, the Court will rule today on, Mr. Breen, your application for expert testimony in the area of eyewitness identification.

I have had a chance to review your submission. I have had a chance to review the applicable law in the Second [2275] Circuit. I will mark, I don't think we have a Court exhibit but I will mark as Court Exhibit Number 1 or the appropriate number, your proffer of what the witness would testify.

Based on the Court's reading of the law in this Circuit, the Court is going to deny your application to call a expert in the area of eye witness identification, specifically Mara B. Goodman, who's a psychologist.

In that regard, the Court does note that the – whether or not to call – to allow an expert to testify is, of course, governed by the Federal Rule of Evidence 702 and the Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, at 509 U.S. 579.*

In Daubert, the Supreme Court established a two-part test for Federal Rule of Evidence 702 for the admissibility of expert testimony. A trial judge must determine first whether the expert who is proposing to testify, whether he or she is proposing to testify to scientific knowledge. And, two, whether such scientific knowledge will assist the trier of fact to understand or determine an issue of fact in this case.

By their holding in Daubert, the Supreme Court rejected the more restrictive rule in *Fry v. United States,* at 293 Fed 1013, that required scientific evidence to be generally accepted in order to be admissible.

On the issue of whether something qualifies as [2276] scientific knowledge, the Daubert court set up a number of criteria that the Court could consider, including whether or not it was generally accepted.

Based on your proffer and based largely on the Second Circuit's holding in *United States v. Lumpkin*, at 192 F.3d 280, which the Court provided to Counsel yesterday, the Court finds that certainly arguably a psychologist testifying to matters relating to eyewitness identification could pass the first portion of the *Daubert* test.

As the Court, noted in the *Lumpkin* case, Doctor Lippi, who was the proposed expert there, plainly qualifies as an expert. And as the trial court noted, his testimony in scientific articles may indeed have been scientifically reliable, suggesting that the Court, the District Court and the Second Circuit may well determine that the first prong of Daubert bar was met.

The Court finds that that may well be the case here; however, as the Second Circuit found in *Lumpkin*, the Court here finds that the exclusion of Miss Goodman's testimony is based on the second prong of *Daubert*, that is the Court's determination that the proposed testimony will not assist the trier of fact in this case to understand and determine a fact in issue.

I note specifically in the Lumpkin case the Court stated the following: Quote, Here Dr. Leepe's proposed [2277] testimony and explication of the scientific studies would have confused the jury's assessment of the officer's credibility. Fundamental to the role of a juror as a trier of fact is the task of assessing a witness's credibility

and a witness's demeanor on the stand, including his or her confidence, impacts the assessment of credibility.

By testifying that confidence bears little or no relationship to the accuracy and identification, which, incidentally, is one of the things that the offer of proof indicates Miss Goodman would testify to, Dr. Leepe would effectively have a inserted his own view of the officers credibility for that of the jurors thereby usurping their role indeed.

By our estimation, added aura of reliability that necessarily surrounds expert testimony would have placed the officer's credibility here in jeopardy.

As a result we find Dr. Leepe's proposed testimony intrudes too much on the traditional province of the jury to assess a witness's credibility.

Based on that holding, the Court finds that it will not allow the testimony.

The Court notes as well that a decision to exclude expert testimony rests soundly within the discretion of the trial court and shall be sustained unless it's manifestly erroneous.

[2278] The Court certainly not only believes that its determination is not manifestly erroneous but is, in fact, proper under all the circumstances.

Clearly, under the Second Circuit case, any testimony regarding identification – regarding confidence would usurp the function of the Jury.

The Court also notes that the proposed offer has the witness testifying to such things as the experimenter

expectancy effect, as well as other studies, which the Court determines would confuse the Jury.

Many of the areas that Miss Goodman would want to testify to are really matters of common sense and have been already effectively explored in cross examination.

And the Court will, of course, consider, if anyone wants, a – if anyone submits it, we'll consider. I'm not saying I would give it but I would certainly consider an instruction on identification testimony.

I'd note that it's proposed that Miss Goodman testify about, for example, about identification bleeding. Under paragraph 6 of the offer it says: Identification bleeding occurred at a prior hearing when Mr. Hilly saw Defendants in Court on the Photo array, this gave him more confidence in his choice and stopped true perception of the actual event; Mr. Hilly has seen Mr. Breen in Court on four different occasions.

[2279] The Court just mentions that because that's how our proceedings work. It's clearly that's going to confuse the Jury to the extent that they may think that there is something wrong by the prior proceedings that have occurred.

I would also note apart from the Court's ruling that just as a matter of a trial strategy, it may be something that in any event, Mr. Breen, you may want to reconsider, we have a stipulation by all parties, including you, that the handwriting on certain exhibits at the Postal Annex was that of Mr. McKinney. The witnesses have testified that Mr. McKinney was the – I believe Mr. Hilly and perhaps Miss Clark or someone else from the Postal

Annex, have testified that they identified photo arrays and they picked out Mr. McKinney as the individual who conducted the transaction, and Mr. Breen as the one who was carrying in the boxes.

Clearly, Mr. Breen, you've stipulated to the fact that Mr. McKinney – that the testimony of the special agent from the F.B.I. on handwriting, that the handwriting, essentially that it was Mr. McKinney's; there doesn't seem to be a dispute as to that.

Additionally, the Court would note, as I did yesterday, the normal circumstance under which perhaps such testimony could be relevant is where a witness is confronted with an unexpected event. The example I gave yesterday I [2280] think is appropriate: I'm walking down the street, someone jumps out with a gun, says, Give me your money. Takes my money. And the transaction is done within seconds.

That was not the case here. There is testimony that the individuals in question were asked to look for individuals who came in with addresses consistent with – having packages on which addresses were – that were consistent with those which the law enforcement personnel had gleaned from the Postal Annex records. So the individuals who were testifying were looking and on the alert for individuals.

In any event, even if Miss Goodman did testify, I assume that would be an area that would be ripe for cross examination.

Also one of the areas that she wants to testify on is the fact that any delay between – I think number 3 in the

offer: Miss Goodman will testify to the effect of time between the event, shipping of the packages and presentation the photo array, and its effect on correct identification.

Typically, in cases a crime may occur on day one and there may be no presentation of a photo array until months later; until such time as the police develop a suspect.

Here that wasn't the case. The packages were mailed on the 3, if memory serves me correctly. The [2281] original identification was made on the 5. And then it was, I think, the witnesses signed the photo array on the 13.

However, those are all side issues. My ruling is that, for the reasons I stated, that the request to call the expert is denied. You can, of course, have an exception to the Court's ruling.

MR. BREEN: Your Honor, I would respectfully request the Court note my exception.

THE COURT: Yes. Your exception is noted, Mr. Breen.

As I indicated, I will mark the Exhibit as Court Exhibit 1. Therefore a reviewing court can take a look at what the witness would have been expected to testify and determine whether, based on my decision, it's correct or not if there is a conviction in the case. Obviously, if there's not, it all becomes academic.

We'll be in recess, then, until 8:30 on Monday.

Any other matters that we need to take up before we recess?

Everyone have a good weekend. Thank you.

(COURT IN RECESS.)